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107.

THE

ONTARIO REPORTS,

VOLUME XXX.

CONTAINING

REPORTS OF CASES DECIDED

IN THE

HIGH COURT OF JUSTICE FOR ONTARIO.

WITH A TABLE OF THE NAMES OF CASES ARGUED,

A TABLE OF THE NAMES OF CASES CITED,

AND A DIGEST OF THE PRINCIPAL MATTERS.

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JUDGES
OF THE
HIGH COURT OF JUSTICE

DURING THE PERIOD OF THESE REPORTS.

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MEMORANDUM.

On the 5th of July, 1899, the Queen was pleased to grant the dignity of a Knight of the United Kingdom of Great Britain and Ireland unto the Honourable JOHN ALEXANDER BOYD, Chancellor of Ontario.

ERRATA.

Page 1, headnote; page 3, line 13; and page 5, line 16 from bottom, for "[1892]" read "[1893]."

Page 34, lines 18 from top, and 8 from bottom, for "Ingram" read "Wigram."

Page 320, head lines, for "R. S. C. ch. 41," read "R. S. C. ch. 129, sec. 41."

REPORTS OF CASES

DECIDED IN THE

HIGH COURT OF JUSTICE FOR ONTARIO.

SHERWOOD V. BALCH.

Arbitration and Award—Staying Action—Objection to Engineer as Arbitrator—Railway Contract—R. S. O. ch. 62, sec. 6.

A clause in a contract for railway construction provided that in case any dispute arose as to the meaning of the agreement, price to be paid, etc., it should be referred to the engineer of the railway company whose decision should be final. A dispute arising as to an alleged usage of allowing an increased percentage for earthwork in embankment, the contractor brought action for it :—

Held, on motion to stay the proceedings, that although the engineer had publicly and privately expressed himself to the effect that no such usage existed, yet as he swore that he would nevertheless give the plaintiffs' contention fair consideration should the matter come before him as arbitrator, the action must be stayed.

Jackson v. Barry R. W. Co., [1892] 1 Ch. 238, specially referred to.

THIS was an action brought against the contractors for the construction of the New York and Ottawa Railway Company by the sub-contractors for a section of the road. The plaintiff's contract was for excavation, and provided that the work should be done according to the specifications, and upon the conditions attached thereto, "and in conformity to the plans and directions, and to the satisfaction and acceptance of the chief engineer of the New York and Ottawa Railway Company." The 9th clause of the contract read as follows :—

" 9th. That in case any disputes or differences shall arise between the company and the contractors as to the construction or true intent or meaning of this agreement, or the sufficiency of the performance of any of the work to

Statement be done under it, or the price to be paid, that all such disputes and differences shall be referred to the engineer, who shall consider and decide the same, and his decision shall be final between the parties, who do hereby submit, all and singular, the premises to the award, arbitration and decision of the engineer, and agree that the same shall be final and conclusive between them to all intents and purposes whatsoever; and it is further agreed, that the submission to the engineer, touching all matters herein contained, agreed to be submitted to him, shall be deemed, considered and taken as an essential part of this agreement, and not revocable by either of the parties thereto."

The plaintiffs were paid the amount of the final estimate of the engineer, but contended that by a custom or usage in railway construction in this country, apart from the provisions of the contract, if work was measured in embankment instead of in excavation they were entitled to a percentage—in this case claimed at 10 per cent.—over and above the measurement made by the engineer.

The plaintiffs issued their writ, and an appearance was entered, and the defendants moved on November 5th, 1898, before MACMAHON, J., under section 6 of the Arbitration Act, R. S. O. ch. 62, for a stay of proceedings, on the ground that the 9th clause of the contract was a submission to arbitration.

An affidavit was filed in reply made by the engineer, the purport of which appears from the judgment.

J. R. Code, for the plaintiffs, opposed the motion, and argued that the arbitrator was not an independent man, and had already expressed himself as being opposed to the contention that any percentage should be allowed, and was disqualified from acting as arbitrator on account of bias; and that at the time the contract was entered into, the plaintiffs did not know that the chief engineer of the New York and Ottawa Railway, who was to be the engineer, was an American, and therefore was not familiar with

the usage claimed to prevail in this country as to allowing the percentage upon work measured in embankment, citing *Conmee v. Canadian Pacific R. W. Co.* (1888), 16 O. R. 639, and the cases there cited; also *East and West India Dock Co. v. Kirk* (1887), 12 App. Cas. 738; *In re Carlisle, Clegg v. Clegg* (1890), 44 Ch. D. 200; *Hughes v. Corporation of Liverpool* (1866), referred to in Annual Prac. 1890-1, p. 152; *Lyon v. Johnson* (1889), 40 Ch. D. 579; *McNamee v. City of Toronto* (1892), 24 O. R. 313; *Nuttall v. Mayor, etc., of Manchester* (1892), 8 Times L. R. 513. Argument.

Dyce Saunders, for the defendants, cited *Farquhar v. The City of Hamilton* (1892), 20 A. R. 86; *Jackson v. The Barry R. W. Co.*, [1892] 1 Ch. 238; *Ives & Bakrer v. Willans*, [1894] 2 Ch. 478; *Eckersley v. The Mersey Docks and Harbour Board*, [1894] 2 Q. B. 667.

November 10th, 1898. MACMAHON, J. :—

Starrs & Co. entered into a contract on August 23rd, 1897, with the defendants Balch & Peppard, for the construction of a certain portion of the New York and Ottawa Railway, the contract providing that the work should be commenced within five days from the signing of the agreement, and should be completed by the first of November following.

Starrs & Co. on August 28th, being the day when the work should have been commenced, assigned their interest in the contract to the plaintiffs, Sherwood & Co., who went on and completed the work.

The 9th clause of the contract provides [setting it out].

The plaintiffs commenced an action to recover a balance claimed to be due for work done under the contract. The defendants have entered an appearance, but have not delivered any pleadings, and the present application is for an order staying the proceedings in the action under the 6th clause of the Arbitration Act, R. S. O. ch. 62.

The 9th clause of the contract is similar to that contained in the contract in *Ives & Barker v. Willans*, [1894]

Judgment. 2 Ch. 478, which Lindley, L.J., at p. 485, calls "a very stringent provision," and says that "one is surprised at first that any contractor should submit to be bound so tightly, because we know perfectly well that a dispute between the contractor and the company is in substance in this business a dispute between the contractor and the engineer whose business it is to see that the works are done for the company according to the agreement in the plans and specifications; so that the real agreement between the contractor and the company is this, that if there is any dispute between them, although the engineer is to tell the contractor what to do, and order him to do what he likes consistently with the agreement, his decision must be final. Now, what is the real explanation of that? How does it happen that a man will agree to be bound by such a stringent provision? The explanation of it is to be found in two circumstances. First of all, competition for this kind of work is very keen, and contractors compete with each other; and in the second place, it has been ascertained by long experience that engineers of the highest character may be trusted, and when a contractor enters into such a very stringent condition as this, he knows the man he is to deal with."

MacMahon,
J.

To the like effect are the observations of Hagarty, C. J. O., and Osler, J. A., in the case of *Farquhar v. City of Hamilton* (1892), 20 A. R. 86, where a clause not unlike the one in the present case was under review.

What was urged on behalf of the plaintiff as a reason why Mr. Anthony, the engineer of the railway company, should not be the arbitrator in this case, is found in a statement made by Mr. Poulin, a member of the plaintiffs' firm, who states that Mr. Anthony had expressed himself both publicly and privately that no such usage existed as was claimed by the plaintiffs, which is, that in the event of earthwork being measured in embankment, instead of excavation, an increase of a certain percentage according to the soil over and above the embankment figures should be allowed, in conformity with a well-known custom or

usage of this country established in connection with railroad contracts, and that the defendants refuse to recognize the usage claimed for by the plaintiffs.

Judgment.
MacMahon,
J.

An affidavit made by Mr. Anthony is filed on behalf of the defendants, in which he states that he has no special recollection of having stated to Mr. Poulin that no such usage existed as that of allowing ten per cent. extra where measurement is made in embankment; but he also stated that "I have no doubt that I did make such a statement to him, and I probably also stated that I would refuse to entertain such a claim." He also alleges that up to the present time (November 2nd, 1898), "I am not at all satisfied that there is such a universal custom in this country of allowing increase in measurement where the measurement is made in embankment," and that if he made the statement to Mr. Poulin or others, he was simply expressing his view as chief engineer of the meaning of the contract, and that it was not meant that he would not give the plaintiffs' contention fair and impartial consideration should the matter come before him as arbitrator.

A case almost parallel in its circumstances with the one now being considered is that of *Jackson v. Barry R. W. Co.*, [1892] 1 Ch. 238, except that the engineer, who was also arbitrator under the contract in that case, had written a letter after the commencement of the arbitration in which he expressed the view which he had previously communicated to the contractor, that the contract bound the contractor to use stone in the interior of a certain embankment (which if used the contractor claimed payment for as an extra), instead of rocky marl which the contractor claimed to be entitled to use under the contract. The Court of Appeal reversed the decision of Kekewich, J., who had granted an injunction restraining the defendants from further proceeding with the reference before the engineer. Lindley, L.J., in his judgment, says, at pp. 245-6, "It appears to me that when you look at this letter carefully it well admits of this construction that Mr. Barry merely repeats what he had said scores of times before,

Judgment.
MacMahon,
J. that in his opinion the contract entitled the company to have stone without paying extra for it. I do not understand this letter as expressing or as implying or insinuating 'I have made up my mind, and whatever I may hear or my assessor may advise me, I shall stick to my opinion.' I think it would be a strained interpretation to come to that conclusion. Unless that is so, unless we can draw the inference that the engineer has precluded himself by the letter from keeping his mind open and from deciding according to the evidence and according to the advice which might be given him, we ought not, in my opinion, to stop this arbitration, and I say that the more readily because under the 19th section of the Arbitration Act, 1889, there is a method by which the contractor can, if he feels aggrieved, obtain the opinion of the Court upon the true construction of the contract."

On the authority of these cases and of *Eckersley v. Mersey Docks and Harbour Board*, [1894] 2 Q. B. 667, I think the defendants are entitled to a stay of the proceedings in this action.

There was one point raised by Mr. Code on behalf of the plaintiffs to which I refer as shewing it has not been overlooked, that is, that the plaintiffs did not know who the engineer was, and that according to the affidavit of Mr. Poulin they did not understand that the engineer was an American engineer. The railway company is known as the New York and Ottawa Railway, and the work that they were about to undertake as the assignee of Starrs & Co. was to have commenced on the very day that Starrs & Co. assigned their contract to the plaintiffs, and it is not reasonable to suppose that they were ignorant as to whom the engineer of the company was, he being the officer of the railway who was to lay out the work, give instructions to the contractors, and sign the progress certificates under the contract.

The motion must be allowed. The defendants are entitled to their costs.

[DIVISIONAL COURT.]

BOLLANDER

V.

THE CORPORATION OF THE CITY OF OTTAWA ET AL.

Municipal Corporation—By-law—Auctioneer—“Regulating and Governing”—Prohibiting—Markets—Regulation of.

The power to regulate and govern auctioneers and other persons conferred on municipal councils by sub-sec. 2 of sec. 495 ch. 184 R. S. O. (1887), did not give power to prohibit the exercise of any lawful calling, and a by-law which prohibits an auctioneer from exercising his calling cannot be supported under that sub-section as amended by 56 Vict. ch. 35, sec. 19 (O.), and 57 Vict. ch. 50, sec. 8 (O.).

The power given by sub-sec. 2 of sec. 503 to pass by-laws “For regulating all markets established and to be established,” gives no implied power to prevent an auctioneer exercising his calling in the markets, but he may be prevented from selling therein any commodities except those for the sale of which the markets were established.

Judgment of MACMAHON, J., reversed.

THIS was an appeal from a judgment of MACMAHON, J., Statement. in an action brought by the plaintiff, an auctioneer, against the corporation of the city of Ottawa to have it declared that a section of a by-law was *ultra vires*, for an injunction to restrain them from interfering with him in the exercise of his calling, and for damages.

The following statement of facts is taken from the judgment of ARMOUR, C. J., in the Divisional Court.

The plaintiff by his statement of claim alleged: (1) That he was an auctioneer carrying on business at the city of Ottawa and duly licensed so to do by the defendant corporation, under the provisions of their by-law in that behalf and that the defendant Hornidge was a market inspector in the employ of the defendant corporation. (2) That prior to the making of an amendment as thereafter set out, the 21st section of by-law 1078 of the defendant corporation, being the “by-law respecting Public Markets and Weigh Houses” was in the words following, that is to say, “No auctioneer, bailiff, crier, or vendor of small wares shall practise his or her calling upon any of the public

Statement. markets or in any of the public streets contiguous thereto or in any of the vacant lots adjoining any of such streets or in any buildings that have been allowed frontages on the public market squares, except in that portion of the Eastern meat, fish and produce market known as the Hucksters' shed, and in the open space lying immediately to the south thereof as far as George street." (3) That by by-law No. 1785 of the defendant corporation passed on the 18th day of October, A.D. 1897, the said 21st section of by-law No. 1078 was amended by striking out the words "excepting in that portion of the Eastern meat, fish and produce market known as the Hucksters' shed and in the open space lying immediately to the south thereof as far as George street." (4) That the said 21st section of the said by-law, as so amended, enacted a total prohibition or prevention of an auctioneer or bailiff as to the practise of his calling upon the public markets of the city of Ottawa, which were a substantial portion of the said city; and that the said section of the said by-law as so amended was *ultra vires* of the defendant corporation and of no legal effect. (5) That the defendants pretended that they were entitled under the provisions of the said section of the said by-law, as so amended, to prevent the plaintiff from practising his calling as a licensed auctioneer upon the public markets of the city of Ottawa, and particularly the market known as the Eastern meat, fish and produce market, which was commonly known as the By ward market. That on or about the 5th day of February, A.D. 1898, the defendants forcibly prevented the plaintiff from practising his calling upon the said market as aforesaid, the defendant, Hornidge, acting therein as the market inspector of the defendant corporation, and since the said date the defendants had continuously so prevented the plaintiff and had threatened to eject him from the said market, in the event of his attempting to practise his calling as aforesaid thereon. (7) That the plaintiff had for a long time prior to the said lastly mentioned date and prior to the passing of the said amending by-law regularly and continuously

practised his calling as an auctioneer upon the said market and had there established an extensive business connection from which he derived his means of livelihood. (8) That by reason of the action of the defendants in so preventing the plaintiff from practising his calling as aforesaid he had been for the time being deprived of his means of livelihood, and otherwise sustained serious loss and damage. Statement.

And the plaintiff claimed : (1) For damages the sum of \$1,000; (2) A declaration that section 21 of by-law No. 1078 of the defendant corporation, as amended by by-law 1785, was *ultra vires* of the said corporation and of no legal effect; (3) An injunction restraining the defendants from interfering with the plaintiff in the practise of his calling as an auctioneer on the public markets of the city of Ottawa; (4) Such further and other relief as the nature of the case might require; (5) His costs of the action.

The defendants by their statement of defence said : (1) That the auctioneer's license granted to the plaintiff by the defendant corporation contained the following conditions, and was subject to the same, that is to say, "This license is subject to the laws of the Province of Ontario and such by-laws, rules and regulations of the corporation of the city of Ottawa as are now and which may hereafter be in force." (2) That the by-laws mentioned in the second and third paragraphs of the plaintiff's statement of claim were enacted by the defendant corporation under the authority of The Consolidated Municipal Act, 1892, sec. 503, for the regulation of their markets; and that the same were *intra vires* and valid and effective. (3) That the plaintiff's statement of claim disclosed no ground of action; and. (4) That the action should be dismissed with costs.

An interim injunction was applied for and obtained, which was subsequently continued until the trial.

The action was tried at the sittings of the Court at Ottawa on the 22nd April, 1898, by MACMAHON, J., without a jury.

Statement. *Geo. F. Henderson*, for plaintiff.
 Taylor McVeity, for defendants.

The by-laws affecting the questions raised and the plaintiff's license were put in and certain admissions made, but no other evidence was given, and the learned Judge delivered the following judgment:—

May 25, 1898. MACMAHON, J.:—

Action brought to restrain the defendants from interfering with or preventing the plaintiff from exercising his calling as a licensed auctioneer upon the public markets of the city of Ottawa.

On payment by the plaintiff on the 10th of September, 1897, of a fee of \$100, he received a license from the corporation of Ottawa to sell goods by public auction in the said city until the 1st of May, 1898, "subject to the laws of the Province of Ontario and such by-laws, rules and regulations of the corporation of the city of Ottawa as are now and which may hereafter be in force."

By-law No. 1078, sec. 21, which was in force at the time the license was issued, provided that [setting out the by-law *ante* p. 7.]

The 21st section of the above by-law was on the 18th of October, 1897, amended by by-law No. 1785, which came into force on the 1st of January, 1898, and provides that such section is amended by striking out the words [setting out the amendment *ante* p. 8.]

On the 5th of February last, the plaintiff attempted to sell on one of the public markets, known as By ward market, a horse which had been impounded by a pound-keeper of the defendant corporation, and which the pound-keeper was entitled to sell under the provisions of sec. 13 of by-law No. 1086 of the said corporation, but the defendant Hornidge, who is the market inspector of the corporation, refused to permit the sale of the horse by the plaintiff, and laid an information against him before

the police magistrate of the city of Ottawa for selling the said horse. Judgment.

MacMahon,
J.

By the Municipal Act, R. S. O. ch. 223, sec. 583, sub-sec. 2, the council may pass by-laws "for licensing, regulating and governing auctioneers and other persons selling or putting up for sale goods, wares, merchandise or effects by public auction; and for prohibiting the granting of such license to any applicant who is not of good character, or whose premises are not suitable for the business or upon residential or other streets in which in the opinion of the council or board it is not desirable that the business of auctioneer should be carried on; such disqualifications to be determined by such means as the by-law provides," etc.

The part of the above sub-section commencing with "and for prohibiting" to the end of the sub-section was added in 1894 (57 Vict. ch. 50, sec. 8 (O)), after the decision in *Merritt v. City of Toronto* (1895), 22 A. R. 205.

By section 580 the corporation may pass by-laws (sub-section 2) "For regulating all markets established and to be established," etc., and (sub-section 4) "For preventing or regulating the sale by retail in the public streets, or vacant lots adjacent thereto, of any meat, vegetables, grain, hay, fruit, beverages, small-ware, and other articles offered for sale."

The effect of this sub-section 4 (then sub-sec. 3 of sec. 503 of the Consolidated Municipal Act of 1892), was considered by the Privy Council in *Municipal Corporation of the City of Toronto v. Virgo*, [1896] A. C., at p. 92, where Lord Davey, in delivering the opinion of the Judicial Committee, said: "Their Lordships are not required to construe this section, or to say whether the words 'adjacent thereto' do not refer to both public streets and vacant lots, and mean adjacent to a market. Having regard to the previous sections under the same rubric they think the clause is one for the protection of the market only, and of limited application."

Adopting this dictum of the Privy Council, as being the

Judgment.

MacMahon,
J.

proper construction to put upon this sub-section, and that the section is limited in its application to public streets and vacant lots adjacent to the market, the impugned by-law as it now stands would, I consider, be bad, in so far as it applies to "any buildings that have been allowed frontages on the public market squares," were it not for the amendment introduced by 57 Vict. ch. 50, sec. 8 (O.), by which a very wide discretionary power is conferred upon councils, who are authorized to pass by-laws "prohibiting" the exercise by an auctioneer of his calling on residential or other streets in which in its opinion it is not desirable that the business of an auctioneer should be carried on. If the "prohibition" can be applied to any "other street" the council can certainly prohibit an auctioneer from practising his calling "in any buildings that have been allowed frontages on the market squares."

When Mr. Justice Gwynne,—for the purpose of illustration and comparison, was dealing with sub-sec. 3 of sec. 495 of the Consolidated Municipal Act of 1892 (now forming part of sub-sec. 2 of sec. 583) in *Virgo v. The Municipal Corporation of the City of Toronto*, 22 S. C. R., at p. 465, the then sub-section only authorized municipal councils to "regulate and govern" auctioneers. But the subsequent part of the present sub-section created by the amendment of 57 Vict. ch. 50, sec. 8 (O.), confers prohibitory powers, as already pointed out, of the widest character.

Neither when continuing the injunction granted by the local Judge, nor during the trial, was I sufficiently impressed by the far reaching powers conferred by the amending enactment.

The action must be dismissed, but as the misapprehension as to the powers of the council to pass the by-law arose from the recent legislation, the dismissal may fairly be made without costs.

On the 13th September, 1898, *Geo. F. Henderson* moved before a Divisional Court composed of ARMOUR, C. J., and STREET, J., to set aside the said judgment and to enter it

for the plaintiff in accordance with his statement of claim ; Argument.
or for such other order as to the Court might seem meet upon the following grounds, that is to say : (1) That the evidence established that the by-law in question, as amended, enacted a total prohibition or prevention of an auctioneer or bailiff as to the practise of his calling upon the public markets of the city of Ottawa, which are a substantial portion of the said city. (2) That the Municipal Act gave no authority to any municipality to enact such total prohibition or prevention as aforesaid, and that the said by-law as so amended was *ultra vires* of the defendant corporation and of no legal effect. (3) That the learned Judge erred in holding that section 583 sub-section 2 of the Municipal Act authorized the enactment by the defendant corporation of a by-law such as that in question herein.

L. G. McCarthy, shewed cause.

November 11, 1898. The judgment of the Court was delivered by

ARMOUR, C. J. :—

I am of the opinion that the 21st section of by-law No. 1078, entitled "By-law respecting Public Markets and Weigh Houses," either as it was originally passed or as it now stands amended cannot be supported.

This by-law was passed on the 13th day of October, 1890, and at that time the defendant corporation had power to pass by-laws for licensing, regulating and governing auctioneers and other persons selling or putting up for sale goods, wares, merchandise or effects, by public auction : R. S. O. (1887) ch. 184, sec. 495, sub-sec. 2.

And I do not think that the power so given to regulate and govern impliedly gave power also to prohibit.

And the Legislature seems to have been of this opinion, for after amending this sub-section by adding thereto the following : " But no such by-law shall apply to or affect a

Judgment. bailiff offering for sale goods or chattels seized as a distress for rent; and such bailiff shall not require any license to entitle him to sell such distrained goods or chattels by public auction to satisfy such rent and the cost of seizure and sale": 56 Vict. ch. 35, sec. 19 (O.), it further amended it by inserting therein after the word "auction" in the third line thereof, the following words: "And for prohibiting the granting of such license to any applicant who is not of good character, or whose premises are not suitable for the business, or upon residential or other streets in which in the opinion of the council it is not desirable that the business of auctioneer should be carried on, such qualifications to be determined by such means as the by-law provides": 57 Vict. ch. 50, sec. 8 (O.).

This amendment shews that the Legislature did not consider that under the power granted to pass by-laws to regulate and govern, a municipality would have power to pass by-laws to prohibit; and it therefore added to the power to pass by-laws to regulate and govern, the power also to prohibit to the extent specified therein.

And the power to pass by-laws to prohibit, to this limited extent excludes the inference of any implied power to prohibit.

I do not think, therefore, that the said 21st section of by-law No. 1078 can be supported under the power given to the defendant corporation to pass by-laws by the R. S. O. (1887) ch. 184, sec. 495, sub-sec. 2, as amended by 56 Vict. ch. 35, sec. 19 (O.), and by 57 Vict. ch. 50, sec. 8 (O.).

Nor do I think that it can be supported under the power given to the defendant corporation to pass by-laws by R. S. O. (1887) ch. 184, sec. 503.

No express power is given by that section to pass such a by-law as that contained in the said 21st section of by-law No. 1078, and the only power that can be said to be given is a power to be implied from the power given by that section of the Act among other powers (2) "for regulating all markets established and to be established"; but I

do not think that any such power can be implied from these words, for it is plain from this whole section of the Act that where the Legislature intended to give the power to pass by-laws to prevent, it did so in express terms. And in sub-section 4 of the said section of the Act express power is given to pass by-laws "for preventing criers and vendors of small ware from practising their calling in the market place, public streets and vacant lots adjacent thereto"; and this power to pass so given expressly to prevent certain classes of persons from so practising their calling excludes the inference of any power given impliedly to prevent any other classes of persons from so practising their calling: see *Merritt v. City of Toronto* (1895), 22 A. R. 205; *Municipal Corporation of the City of Toronto v. Virgo*, [1896] A. C. 88.

The markets established by by-law 1078 were so established for the sale therein respectively of certain kinds of commodities, and the defendants can of course prevent the plaintiff or any one else from selling therein any commodities but those for the sale of which the said markets were respectively established.

The license granted to the plaintiff was made "subject to such by-laws, rules and regulations of the corporation of the city of Ottawa as are now and which may hereafter be in force," but this provision did not make the license subject to by-laws, rules and regulations which the said corporation had no power to make.

An injunction ought to go restraining the defendants from interfering with the plaintiff in the exercise of his calling as an auctioneer in selling upon any of the markets of the city of Ottawa by auction any of the commodities for the sale of which thereon such markets were respectively established.

The plaintiff will also have judgment for the sum of fifty dollars for the damages by him sustained and his full costs of this suit and of the interim injunction.

[DIVISIONAL COURT.]

CASTON

V.

THE CORPORATION OF THE CITY OF TORONTO.

Assessment and Taxes—Arrears—Collector's Roll—Duty of Collector—R. S. O. 1887 ch. 193, sec. 135 (R. S. O. ch. 224, sec. 147)—Omission of Requirements—Illegality of Subsequent Proceedings—Responsibility of Municipality.

Where there is sufficient property available for distress, on land assessed, during all the time in which the collector for the year has the roll, the taxes thereon cannot be legally returned to the treasurer and cannot be legally placed upon the collector's roll for a subsequent year.

The requirements of section 135 of the Assessment Act, R. S. O. 1887 ch. 193 (R. S. O. ch. 224, sec. 147), by which a collector is directed to enter on the roll opposite each assessment the reason of his inability to collect the taxes, and at the time of the delivery of the roll to the collector to furnish the clerk of the municipality with a duplicate, who thereupon is to mail a notification to each person on the roll with respect to whose land taxes appear to be in arrear for that year, are imperative, and any account delivered by the collector to the treasurer which does not conform to these requirements is ineffectual to sustain any further proceedings, in this case a distress of goods and chattels, in respect of the taxes therein set forth, and the making of the affidavit in pursuance of section 136 of the Act does not cure the defect.

Seemle, when the above requirements are omitted the municipality cannot recover the amount of the arrears in any manner.

A municipality is responsible for the acts of its officers in illegally placing arrears of taxes on the roll of a collector and subsequent distress therefor.

Statement.

THIS was an appeal from a judgment of MEREDITH, C. J.

The following statement of facts is taken from the judgment of ARMOUR, C. J., in the Divisional Court:

This action was commenced on the 12th June, 1896, by writ of summons claiming damages for trespass in an alleged claim for taxes for 1891 on 65 Huntley street, Toronto; for unlawfully causing proceedings to be taken to collect the same; for trespassing, seizure and distress upon said premises and against the goods and chattels therein; for a declaration that such taxes had been paid, and that the defendants had no claim therefor; for certify-

ing that there were unpaid arrears of taxes against said premises and for an injunction order to restrain proceedings by the defendants in respect of said alleged claim. Statement.

A motion for an injunction was made before my brother, ROSE, and upon counsel stating that the plaintiff had given a bond for the payment of the amount alleged to be due for taxes, and the plaintiff giving the usual undertaking as to damages; it was ordered that the motion should stand adjourned until the trial or other determination of the action, all proceedings to enforce the distress upon the premises in question to be stayed in the meantime; costs to be costs in the cause unless otherwise ordered by the trial Judge.

The cause came on for trial before MEREDITH, C. J., at the Toronto Assizes, 1897, without a jury, when it appeared that the plaintiff was on the collector's roll of 1891 for the taxes for that year in respect of number 65 Huntley street, and that his sister Mary L. Caston was upon the said collector's roll for 1891 for the taxes for that year in respect of number 63 Huntley street. That on January 16th, 1892, the plaintiff paid to the collector the sum of \$75 on account of taxes: and the collector swore that the plaintiff told him to apply enough of the money to pay off the general taxes on number 63, and the balance to go on his own house number 65.

The plaintiff denied that he ever gave the collector any such instructions.

And the collector also swore that from the year 1885 the plaintiff had always paid the taxes in respect of number 63. The plaintiff admitted that he had paid the taxes on number 63 on one or two occasions, but denied that he had done so oftener.

The taxes for the year 1891 in respect of number 63 were \$55.44, and those taxes being paid out of the \$75, left the sum of \$19.56 applicable to the taxes for 1891 in respect of number 65, and the residue of the taxes for the year 1891 in respect of number 65, with accrued interest as provided by statute, was put upon the collector's roll

Statement. for the year 1895, and the plaintiff's goods were distrained for it, and hence this suit.

The learned Chief Justice found that the \$75 paid by the plaintiff on account of taxes were directed by the plaintiff to be applied by the collector as sworn to by him, and he dismissed the action with costs.

On the 10th December, 1897, *Clute*, Q. C., moved before a Divisional Court composed of *ARMOUR*, C. J., and *FALCONBRIDGE*, J., to set aside the said judgment, and to enter judgment for the plaintiff or for a new trial on various grounds.

Fullerton, Q. C., shewed cause.

And upon its being contended by the plaintiff's counsel that it was not sufficient for the defendant to shew that the residue of the taxes in respect of number 65 was unpaid, but that they ought to have gone further, and shewn that they were justified in putting such residue upon the collector's roll for 1895, the Court directed that further evidence might be given in respect of such justification, and further evidence was accordingly given on the 19th December, 1897, when it further appeared that the collector of the taxes for the year 1891 had, on the 22nd day of April, 1892, delivered to the treasurer of the city an account of all the taxes remaining due on the roll; but in such account the collector did not shew opposite to each assessment the reason why he could not collect the same; nor did it appear that he at the same time furnished the clerk of the city with a duplicate of such account; nor did it appear that the clerk upon receiving such account mailed a notice to each person appearing on the roll with respect to whose land any taxes appeared to be in arrears for the year 1891.

That the collector on the 13th October, 1892, made oath before "John Patterson, deputy city treasurer," that the sums mentioned in such account remained unpaid, and that he had not, upon diligent enquiry, been able to discover sufficient goods or chattels belonging to or in pos-

session of the persons charged with or liable to pay such said sums, or on the premises belonging to or in the possession of any occupant thereof whereon he could levy the same or any part thereof, and was credited with the amount not realized. Statement.

A by-law of the city was put in providing that notwithstanding anything contained in by-law No. 2436, or any other by-law of the corporation to the contrary, John Patterson, the deputy treasurer, was thereby empowered to perform all the duties of the treasurer during the duly authorized absence of that officer.

That the assessor for the year 1894 returned number 65 as occupied by the plaintiff.

That the balance due for the taxes of 1891 in respect of number 65 was, assuming the application of the \$75 by the collector to be correct, \$51.23; that the clerk of the city added, in making out the collector's roll for the year 1895 \$69.27 to the taxes assessed against number 65 for that year, as and for such arrears in respect of the taxes for the year 1891, with the percentage added thereto.

That the collector's roll for 1895 was delivered to the collector on the 28th June, 1895.

That on the 1st April, 1896, the collector issued his warrant of distress to his bailiffs, authorizing and requiring them, to distrain the goods of the plaintiff for the sum of \$128.17, made up as follows:—

General taxes.....	\$45 50
Sewer	7 30
Arrears	69 27
Percentage	6 10
	<hr/>
	\$128 17

That the plaintiff paid to the said bailiffs in respect of the said sum, so required by the said warrant to be distrained for, the following sums at the respective times hereunder mentioned, viz.:—

Statement.

1896.	
May 2.....	\$10 00
" 11.....	15 00
" 15.....	20 00
" 25.....	12 00
Oct. 29.....	3 50
	<hr/>
	\$75 50

That under the said warrant of distress the bailiffs had seized goods of the plaintiff of the value of from \$700 to \$1,000, and after the dismissal of the action by the learned Chief Justice, they proceeded and sold the said goods and realized thereout \$76.57, the balance authorized to be distrained for by the said warrant.

That during all the time during which the collector's roll for the year 1891 was in the hands of the collector for that year, there were plenty of goods of the plaintiff in number 65, out of which the balance of the taxes payable by him might have been levied : and the plaintiff swore that from the time he paid the \$75 until the year 1895, he had never had any notice that there were taxes in arrear in respect of number 65.

The motion was argued on September 13th, 1898, before a Divisional Court composed of ARMOUR, C.J., FALCONBRIDGE, and STREET, JJ.

Clute, Q. C., for the motion. The plaintiff's evidence is that he paid the taxes to the collector, and as he holds a receipt for them the onus is on the defendants to shew that the money paid was to be applied on the property of another, rather than his own, as the collector alleges. The arrears are said to be for the year 1891, but no demand was made until 1895. They are put upon the 1895 roll, and the seizure is made under that roll. Is that sufficient ? The preliminaries required by sec. 135 of the Assessment Act, R. S. O. 1887 ch. 193, were not complied with. No duplicate account was sent to the clerk, and no notices

were mailed by him. There was property on the premises all the time which could have been seized: and the affidavit made under section 136 by the collector does not cure the defect. I refer to *Nicholls v. Cumming* (1875), 25 C. P., at p. 178; *S. C.* (1877), 1 S. C. R. 395; *Cogswell v. Holland* (1889), 21 Nova Scotia 279; *O'Brien v. Cogswell* (1890), 17 S. C. R. 420; *The Municipal Corporation of the Town of Trenton v. Dyer* (1895), 24 S. C. R. 474; *Deverill v. Coe* (1886), 11 O. R., at p. 240, *per* ARMOUR, J.; *Whelan v. Ryan* (1891), 20 S. C. R. 65; *McKay v. Crysler* (1879), 3 S. C. R. 436; *Flanagan v. Elliott* (1886), 12 S. C. R. 435.

J. W. McCullough, on same side. There is no authority for adding the arrears to a new roll. Section 144 is alleged to be authority, but it only applies to lands which were unoccupied when the taxes were assessed and subsequently became occupied. I refer to *Love v. Webster* (1895), 26 O. R. 453.

Fullerton, Q. C., and *W. C. Chisholm*, contra. The evidence shews the money paid was not the plaintiff's, and that it was applied as directed, and the trial Judge has so found, which finding should not be interfered with. The imposition of the tax is not in dispute. The finding of the trial Judge as to the appropriation of the payment made by the plaintiff is supported by the evidence. The notice left by the collector for the plaintiff in 1891 was a sufficient "demand": Con. Assessment Act 1892, 55 Vict. ch. 48, sec. 123 (1), (O.); *Goldie v. Johns* (1889), 16 A. R., at p. 137; *Chamberlain v. Turner* (1881), 31 C. P. 460. [ARMOUR, C. J.—The fact that the plaintiff paid part of the taxes would seem to be evidence that the demand was made.] The return of the taxes by the collector as unpaid was sufficient, at any rate as against the plaintiff. The provisions in sections 133 to 136, are intended as a check upon the collector, and are not mandatory, so as to affect the right of the corporation to charge the unpaid taxes against the lands. Section 124 as to distress is also merely directory: *Blackwell on Tax Titles*, 5th ed., secs. 471-72; *Carson v. Veitch* (1885), 9 O. R. 706; *Dalziel v. Mallory* (1888), 17 O. R. 80; *Lewis v. Brady*

Argument.

Argument. (1889), 17 O. R. 377. The corporation is not liable for acts of their collector, an officer appointed in obedience to the statute : Assessment Act, secs. 133-47 ; The Municipal Act, sec. 295 R. S. O. ch. 223 ; *McSorley v. The Mayor, etc., of the City of St. John* (1882), 6 S. C. R. 531 ; *Seymour v. The Township of Maidstone* (1897), 24 A. R. 370 ; *Mills v. McKay* (1868), 14 Gr. 602.

Clute, Q. C., in reply. The assessor is an officer of the defendants, and they are responsible for his acts : *Nicholls v. Cumming* (1877), 1 S. C. R., at p. 421. The defendants must shew that all their proceedings were properly taken : *O'Brien v. Cogswell* (1890), 17 S. C. R., at p. 463. See also *In re Patrick Quin* (1864), 23 U. C. R. 308 ; and *Coleman v. Kerr* (1867), 27 U. C. R. 5.

November 21, 1898. The judgment of the Court was delivered by

ARMOUR, C. J. :—

The learned Chief Justice found that the application of the \$75 paid by the plaintiff to the payment of the taxes for 1891 in respect of number 63, and the balance to the payment of the taxes for 1891 in respect of number 65, was made by the collector under instructions to that effect from the plaintiff, and I do not think that we can properly reverse the judgment of the learned Chief Justice in this respect ; who in coming to his conclusion was determining upon the credibility to be given to the conflicting statements of the plaintiff and of the collector.

It was contended that there was no evidence to shew that the collector had ever demanded payment of the taxes payable by the plaintiff, or had ever given notice specifying the amount of such taxes as required by R. S. O. (1887) ch. 193, sec. 123 (1), nor was there any evidence to shew that he did at the time of such demand or notice, or immediately thereafter, enter the date thereof on his collection roll opposite the name of the plaintiff, or cause the same to be

so entered as required by the said section, and that we ^{Judgment.} ought to infer that no such demand or notice had ever been ^{Armour, C.J.} made or given.

But from the fact that the plaintiff paid a portion of the taxes, payable by him in respect of number 65, we ought, I think, to infer that such demand or notice had been made or given.

Section 135 of the Act R. S. O. (1887) ch. 193, provided that "If any of the taxes mentioned in the collector's roll remain unpaid, and the collector is not able to collect the same, he shall deliver to the treasurer of his municipality an account of all the taxes remaining due on the roll; and, in such account, the collector shall shew, opposite to each assessment, the reason why he could not collect the same by inserting in each case the words *Non-resident* or *Not sufficient property to distrain* or *Instructed by council not to collect*, as the case may be: and said collector shall at the same time furnish the clerk of the municipality with a duplicate of such account, and the clerk shall, upon receiving such account, mail a notice to each person appearing on the roll with respect to whose land any taxes appear to be in arrear for that year."

It could not be said that the collector was not able to collect the taxes for the year 1891 in respect of number 65, for during all the time during which the collector's roll for that year was in his hands the plaintiff had sufficient property in number 65 out of which he could have collected by distress the balance payable by the plaintiff in respect of such taxes.

Under these circumstances I do not see how the balance of these taxes could be legally returned to the treasurer, and could be legally placed upon the collector's roll for the year 1895.

And I do not see how the account, delivered by the collector to the treasurer, could form a basis for any further proceedings to collect the said balance, for the collector did not obey the plain requirements of this provision, by shewing opposite to each assessment (including the plaintiff's)

Judgment. the reason why he could not collect the same, nor did it appear that the collector, at the same time that he delivered his account to the treasurer, furnished the clerk of the municipality with a duplicate of such account, nor that the clerk upon receiving such account mailed a notice to each person (including the plaintiff) appearing on the roll with respect to whose land any taxes appeared to be in arrear for that year.

It seems to me that the requirements of this provision are imperative, and that any account delivered by the collector to the treasurer of the municipality, which does not conform to these requirements is ineffectual to sustain any further proceedings in respect of the taxes therein set forth.

It is for the interest of the municipality, as well as for the interest of its ratepayers, that all the provisions in the Assessment Act for the collection of the taxes should be strictly followed, especially where, as in the provision under review, the words used are mandatory, and there is nothing in the context to shew that the words used are permissive.

It was contended that the affidavit made by the collector in pursuance of section 136 of the said Act healed the breach of the observance of the requirements of section 135, but to this I cannot agree.

The object of delivering the account to the treasurer in pursuance of the requirements of section 135 is to found upon it the further proceedings necessary for the collection of the taxes therein set forth, and the object of the affidavit required to be made by section 136 is to authorize the treasurer to credit the collector with the amount of the taxes not realized by him.

The conclusion that I have arrived at, therefore, is that the arrears of taxes for the year 1891 in respect of number 65 were illegally placed on the collector's roll for the year 1895, and were illegally distrained for.

The effect of this may be to altogether relieve the plaintiff from the payment of these arrears, which he ought to

have paid and ought to pay, for, although section 137 of the Act provides "that the taxes assessed on any land shall be a special lien on such land," yet, the only mode of enforcing such lien is by proceeding in the method pointed out by the statute, which in the view I have taken cannot be adopted. Judgment.
Armour, C.J.

And although section 131 of the Act provides that "If the taxes payable by any person cannot be recovered in any special manner provided by this Act, they may be recovered with interest and costs, as a debt due to the local municipality:" yet the present is not a case in which these arrears could not have been recovered in the special manner provided by the Act, for they could have been so recovered had the collector performed his duty: *Carson v. Veitch* (1885), 9 O. R. 706.

I see no ground for holding that the defendants are not responsible for the acts of their officers in placing these arrears of taxes upon the collector's roll of 1895, and in having them distrained for.

Had the plaintiff's goods not been sold, an injunction would have gone restraining the sale of them, but having been sold, the plaintiff is entitled to recover his damages by reason thereof.

And these damages should be limited to the amount of the arrears of taxes for the year 1891 distrained for, and the percentage added thereto, and the costs and charges, and a small sum for the trouble and inconvenience caused to the plaintiff by reason of such distress and subsequent proceedings thereon, in all, say \$100.

Judgment will therefore be entered for the plaintiff against the defendants for \$100 damages, with full costs of suit.

G. A. B.

[DIVISIONAL COURT.]

LAIDLAW ET AL. V. LEAR ET AL.

*Injunction—Letters—Stenographic Notes of—Property in—Stenographer—
Implied Contract—Breach—Publication—Public Interest.*

Documents consisting of notes or drafts of private letters dictated by a member of a firm of solicitors to a stenographer in the course of business in the office were surreptitiously taken by him and given to another person who, knowing how they had been obtained, proposed to publish them and to use them as evidence in a criminal prosecution or parliamentary inquiry he alleged he intended to bring about, although they contained nothing which could have been used as evidence against anyone :—

Held, that the property in the documents was in the plaintiffs and their possession having been obtained by a breach of contract the plaintiffs were entitled to a perpetual injunction restraining their publication.

Statement. THIS was an appeal from the judgment of FALCONBRIDGE, J., continuing an injunction to the trial of the action; which injunction had been granted on the application of the plaintiffs, who were a firm of solicitors, restraining the publication of certain letters and documents dictated to, and copied out by, one of the defendants, a stenographer employed by them, and which the other defendant had obtained from him, after he had been dismissed from the service of the plaintiffs.

The other material facts are fully set out in the judgment of STREET, J., in the Divisional Court.

The interim injunction was granted on the 19th August, 1898, by FALCONBRIDGE, J., on the application of W. B. Raymond for the plaintiff.

The motion to continue the injunction was returnable on the 26th August. In the meantime, the defendant E. A. Macdonald, obtained special leave to move to dissolve the injunction, which motion was made returnable, and was argued before the same learned Judge on 23rd August, 1898, when

The defendant Macdonald in person moved to dissolve it. Judgment.

E. F. B. Johnston, Q.C., and *Raymond*, appeared for the plaintiffs. Falconbridge,
J.

At the close of the argument the following judgment was delivered:—

August 23rd, 1898. FALCONBRIDGE, J. :—

On the 19th inst., an application was made to me by counsel for the firm of Laidlaw, Kappele & Bicknell, practising as solicitors, etc., in this city, against F. G. Lear, and E. A. Macdonald, for an injunction to restrain the publication of certain dictations of letters and other documents, upon the affidavit of Mr. Kappele, which stated generally that the defendant, Lear, had been for some years in the employment of the plaintiffs, and was a trusted employee: that about the 23rd May last, the plaintiff Laidlaw, having heard something about Lear, dismissed him: that shortly afterwards it became known that the defendant, Lear, was associating with Macdonald, and that Lear claimed to have certain letters and documents which he could only have received as being in the plaintiffs' employ, and as a trusted servant of the office. And the deponent went on to say that these matters were being published, and ought not to be so published, and plaintiffs prayed for an injunction, which I granted.

The motion for injunction was directed to be heard next Friday, but in the meantime the defendant, Macdonald, obtained from me leave to serve notice of motion for this morning, to dissolve the injunction on the grounds set forth in his affidavit, viz., That the Legislative Assembly would adjourn on Thursday or Friday of this week, and would not sit again during the present year, and that the injunction was obtained for the purpose of preventing him from presenting the petition to the Assembly, and that he was only using the petition and material on which it was based for the purpose of bringing to justice certain persons

Judgment. whom he charged with having defrauded the corporations
 Falconbridge, of Toronto and Montreal.
 J.

At the opening of the argument this morning, I intimated to the parties that, if in my opinion the injunction ought not to be dissolved, this would be the final argument so far as I was concerned, and that the injunction would be continued in that event until the trial.

I had occasion to consider the matter upon the two *ex parte* applications, which were made to me, viz.:—First, the application for the injunction; and Secondly, the application for leave to move to dissolve it. Therefore, although I had no doubt about the general law bearing upon the case, I looked into the older authorities, some of which are very interesting, on the question of law involved, that is, as to the right of property in letters.

It is laid down by Mr. Kerr, in the 3rd edition of his book, generally in these terms:—"The receiver of a letter has a right to the possession of it, and may take proceedings at law for the recovery of it if it be taken out of his possession, but he has no right to publish the letter without the consent of the writer," p. 498. That refers to the receiver. Even the receiver has no right to publish the letter without the consent of the writer.

"If the letters are returned to the writer by the receiver, the right of possession of them is then abandoned; if copies are kept, there can be no publication of them. The editor of a newspaper, to whom letters are sent for insertion in the paper may not publish them, if, before publication, the writer wishes to withdraw them," p. 498.

The oldest case in England is a very interesting one, by reason of its literary flavour. That was a motion made by the celebrated poet, Alexander Pope, against Curl, the bookseller. Pope had obtained an injunction *ex parte*, as in this case, and Curl, having put in his answer, moved to dissolve it. These letters were of course only valuable as literary matter, but it will be seen by cases which I shall hereafter cite that the same principle is applicable to private and business letters. In that case the Lord Chan-

cellor said ; there is “ only a special property in the receiver, possibly the property of the paper may belong to him, but this does not give a license to any person whatsoever to publish them to the world, for, at most, the receiver has only a joint property with the writer.” The case is reported in 2 Atkyns (1741) 341. Judgment.
Falconbridge,
J.

Then, there is an interesting and historical case, *Thompson v. Stanhope*, which is reported in Ambler, at page 737, which had reference to the celebrated letters of Lord Chesterfield, and in that case the executor, the person to whom the letters were written, was restrained from publishing the letters without leave of the executors of the person who wrote them. That is a judgment of Lord Chancellor Apsley, decided in 1774, and he observed : “ She did very ill in keeping copies of the characters, when Lord Chesterfield meant that they should be destroyed and forgot,” p. 739.

Next, there is a case in 2 V. & B., in 1813, of Lord and Lady Perceval against Phipps, which does not go so far as the preceding cases, inasmuch as it was held that Lady Perceval had given some license to use the letters. That case was distinguished and explained in a case of *Gee v. Pritchard* (1818), in 2 Swanston, p. 414, which contains a very clear exposition of the law upon the subject.

The head note is :—“ Letters written by the plaintiff to the defendant, having been returned by him, with a declaration that he did not consider himself entitled to retain them ; the publication of copies taken before the return without the knowledge of the plaintiff, was restrained by injunction, though represented by the defendant as necessary for the vindication of his character.” That comes very near the second branch of Mr. Macdonald’s argument, where he maintains it is necessary for the public interest. Lord Eldon in that case gave the judgment, and expresses himself very strongly upon it (referring to the curious passage from Selden’s Table Talk) : “ Nothing would inflict upon me greater pain, in quitting this place, than the recollection that I had done anything to justify

Judgment. the reproach that the equity of this Court varies like the
Falconbridge, Chancellor's foot," p. 414.
J.

However, he thought that all the judgments concurred in the direction in which he gave that one, and had no regard to the length of the Chancellor's foot. See also *Lytton v. Devey* (1884), 1 Times L. R. 41.

The law seems to have been so well settled in England, that there is no case since 1818 varying that exposition of it, and the same view has been followed in the United States in numerous decisions, which are to be found in that valuable compendium the American and English Encyclopædia of Law, vol. X., p. 930 ; so that the general law may be stated to be, as it is summed up in one of the text books, that the publication of private letters, whether on private matters of business, literary topics, or relating to family affairs, if attempted to be published without authority, may be enjoined. So far then, with reference to the general question.

Then it is alleged that this is a matter in the *public interest*, and that high crimes deserve investigation, and can only be investigated in that way.

Well, the answer to that is plain : The criminal authorities, and the assistance of the criminal courts have been invoked ; the matters have been laid before them, and resulted in nothing. I cannot, sitting here, assume, and I will not assume, that those people who have had charge of the investigation of criminal matters in this Province, have done anything except what was right.

Then it is said the defendant, Macdonald, has at any rate a right to go to the Legislative Assembly and bring these matters before them. He says in his petition, that several members have been approached with this petition, and that numbers of them have refused to present it, and in particular the four city members. Although it is not set out in the petition or verified in any way, he says now that there is a member who will present the petition.

I think I have a right to say, that if several members, including the four members of the city of Toronto, have

refused to present this petition, there is some reason— Judgment.
 good and proper reason—no doubt, which induced them to Falconbridge,
 take that course. Be that as it may, I know as a matter J.
 of fact, as a matter of official knowledge, that this Parlia-
 ment is called together for the transaction of certain busi-
 ness as declared in the speech delivered by His Honour the
 Lieutenant Governor. That when that special business,
 and perhaps certain other business which is absolutely
 necessary, is disposed of, the House will shortly prorogue.
 I feel quite certain, that the House would not, even
 although a petition were presented, take up and deal with
 this matter now. So that if I did allow this matter to go
 on, if I did allow publication to any extent of this material,
 unverified as it is, unsupported by any affidavit; even of
 the person who has taken away this property of his
 employers, unlawfully, as it would appear; I should simply
 be allowing an unqualified publication of this material with-
 out the defendant Macdonald being advanced one day
 beyond what he will be, if he gets the right to present it
 when the House re-opens after the adjournment.

Under these circumstances I think it would be very
 wrong to allow further publication of this material,
 launched in the way in which it is, until at any rate the
 trial of this action. The action can be tried before the
 House sits again, or there may be some way or other in
 which the matter may be presented to the House.

I think the injunction should be continued until the
 trial; although the matter may have already received
 great publicity, and, furthermore, that although these pro-
 ceedings have been taken in an open Court, no one shall
 be at liberty, by reason of that, to publish this petition at
 large, either in a newspaper or in any other way.

From this judgment the defendant E. A. Macdonald,
 appealed, and upon the appeal coming before the Divisional
 Court, it was, by consent of counsel and all parties, turned
 into a motion for judgment on the pleadings, and was
 argued on September 16, 1898, before ARMOUR, C. J., and
 STREET, J.

Argument.

On the opening of the matter, *Osler*, Q.C., for the plaintiffs, stated that the whole object of the action was the prevention of publication of certain documents, and asked that members of the press, who were present, should be excluded.

ARMOUR, C.J.—I do not think the members of the press should be excluded from a public court. I presume they will exercise a wise discretion in not publishing anything which the Court thinks should not be made public.

Love, appeared for the defendant *Lear*, and consented to the injunction being made perpetual.

Macdonald, the other defendant, in person. No injunction should be granted restraining the publication of these letters. There are many exceptions to the rule that letters may not be published against the will of the writer, and this is one: *Lord and Lady Percival v. Phipps* (1813), 2 V. & B. 19. I contend I am in possession of evidence of a crime against society, and that the writer of the letters comes to the Court an acknowledged criminal. If the letters are privileged, the Court will so hold when they come before the Court. If I wrongfully publish them, there is a remedy against me for libel, and I risk my personal liberty.

Osler, Q.C.—The letters cannot be read here.

ARMOUR, C. J.—I do not think the letters can be read. This argument should not be used to effect what is sought to be enjoined by the action. You may refer to the different clauses, and the Court will read them. What crime do they disclose?

Macdonald.—I contend the letters indicate “conspiracy,” “fraud,” and “perjury.”

ARMOUR, C. J., to *Osler*, Q. C.—How can we prevent his reading what he founds his argument on?

Osler, Q. C.—I have authority to shew the material should not be read in open Court: *Mellor v. Thompson* (1885), 31 Ch. D. 55.

ARMOUR, C. J.—Well, if it is insisted on, the Court must be cleared.

Macdonald.—I prefer to forego such a right rather than Argument. argue the motion in a secret chamber, and refer your Lordships to the letters, copies of which have been put in. I desire to petition the Legislature with the letters as material. My right to petition is a Magna Charta right, and the Court has no more power to enjoin me from appealing to Parliament, than it has to prevent me from going to a Court of Appeal: *Saull v. Browne* (1874), L. R. 10 Ch. 64.

Osler, Q.C., *Johnston*, Q.C., and *Raymond*, for the plaintiffs, contra. The letters are before the Court. We have the right to restrain their publication, as they are our property, and have been stolen. As a matter of fact they never were sent, but were destroyed on mature consideration.

ARMOUR, C.J.—I suppose there is no doubt the property in letters is in the receiver, subject to the control of the sender?

Osler, Q. C.—The property is in the writer: 13 Am. & Eng. Ency. 251. A clerk is under an implied contract not to make public information acquired as such clerk: *Tipping v. Clarke* (1843), 2 Ha., at p. 393, or use it to the detriment of his employer: *Robb v. Green*, [1895] 2 Q. B. 1. See also *The Earl of Lytton v. Devey* (1884), 1 Times L. R. 41. An owner of a manuscript has the right to judge whether he will make it public or not, and the plaintiffs have a property, not only in the letters, but in the contents: 1 Morgan's Law of Literature, p. 383, sec. 182. A case of *Brown's Trustees v. Hay, The Scotts*, L. T. Rep., vol. 6, p. 113 (Sept. 24, 1898*), is directly in point. There, the accountant was not only ordered to deliver up the papers, but interdicted from communicating them, and was mulcted in damages, and the inland revenue officers, to whom the information had been communicated, declined to proceed in the matter. Here, the Attorney-General has had the information and declined to take the matter up. The

* See also "The Accountant" (chartered accountant's organ), August 13, 1898. Article, p. 781; report of case, p. 796.

Argument. letters shew no crime whatever committed by, or to which the writer was a party, and there is no public end to be served by their publication. Macdonald was an accessory after the fact to the wrongful taking of the letters: Taschereau's Criminal Code, p. 40, sec. 63. The Legislature has the right to refuse to receive the petition: Bourinot's Parliamentary Procedure and Practice, 2nd ed., p. 321.

Macdonald, in reply.

November 1, 1898. ARMOUR, C. J. :—

This case belongs to a class of cases in which Courts of Equity have interfered to prevent the publication of documents which have been obtained, as the documents in question in this case were obtained, not only on the ground of property but also on the ground of their having been obtained by breach of contract express or implied or by breach of trust or confidence.

In *Tipping v. Clarke* (1843), 2 Ha., at p. 393, Vice-Chancellor Ingram said that "every clerk employed in a merchant's counting house is under an implied contract that he will not make public that which he learns in the execution of his duty as clerk. If the defendant has obtained copies of books, it would very probably be by means of some clerk or agent of the plaintiff, and if he availed himself surreptitiously of the information, which he could not have had except from a person guilty of a breach of contract in communicating it, I think he could not be permitted to avail himself of that breach of contract."

These observations of Vice-Chancellor Ingram were expressly concurred in by Lord Chancellor Cottenham in *Prince Albert v. Strange* (1849), 1 Mac. & G. 25, and are entirely applicable to this case. The documents here in question were obtained by the defendant Lear, in breach of his implied contract as a clerk of the plaintiffs, not to make public that which he learned in the execution of his duty as such clerk, and the defendant Macdonald having obtained

them from the defendant Lear acquired thereby no greater right to them than the defendant Lear had. See also *Judgment.* *Yovatt v. Wingard* (1820), 1 J. & W. 394; *Green v. Folgham* (1823), 1 S. & S. 398; *Morison v. Moat* (1851), 9 Ha. 241; *Robb v. Green*, [1895] 2 Q. B. 1. *Armour, C. J.*

The defendant Macdonald strenuously contended that our granting the injunction prayed for in this action would interfere with his purpose of bringing to justice certain persons whom he charged with having defrauded the corporation of the city of Toronto and the corporation of the city of Montreal out of large sums of money or franchises representing great commercial value.

If these documents afforded any evidence of any such fraud it might well be argued that we should not enjoin their use for such intended purpose: *Gee v. Pritchard*, 2 Swanston (1818) 402, at p. 427; *Folsom v. Marsh* (1841), 2 Story (U. S. Cir. Rep.) 100, at p. 111; *Hopkinson v. Lord Burghley* (1867), L. R. 2 Ch. 447; Taylor on Evidence, 9th ed., sec. 922.

But they furnish no evidence that could be adduced in any Court in proof of such fraud. All that the letters shew is that the writer knows of such fraud and his is the best evidence and not the letters which he has written.

The only use that could be made of the letters in any action or proceeding would be to confront the writer of them with them in case he were called as a witness, but this collateral use of them would not justify our refusal to grant the relief asked for.

There will be judgment, therefore, for the plaintiffs, modelled upon the decree in *Prince Albert v. Strange* (1848), 2 DeG. & S. 652, at p. 717, with costs of the action and of the interim injunction.

STREET, J.:—

The facts of the case before us are very simple.

The plaintiffs are a firm of solicitors practising in Toronto, and the defendant, Lear, was employed by them as a stenographer.

Judgment.

Street, J.

Being dismissed from their employment he carried away with him certain written documents belonging to his employers, being the notes or drafts of private letters written by a member of the firm to one of his partners and to a client.

These documents were handed to the defendant E. A. Macdonald, who knew Lear to have been in the employment of the plaintiffs, and must be taken to have known of the manner in which he had obtained them.

Macdonald believing that the documents contained statements shewing that certain offences against the criminal law had been committed, laid them before the County Attorney for the city of Toronto, who in his turn submitted them to the Attorney-General of the Province of Ontario, with the result that these officers refused to undertake or authorize any prosecutions.

The Attorney-General further directed the documents themselves to be impounded, but at the request of Macdonald, and upon his insisting that an undertaking which had been given him to that effect should be carried out, they were returned to him. He then embodied the correspondence in a petition to the Legislature, then in session, praying for an enquiry. He had previously applied to the city council of the city of Toronto to enquire into the matter and undertake the prosecution of it, but the committee of the council to which his application was referred had reported adversely to it.

The plaintiffs then commenced this action to restrain the publication of the documents and asked to have them delivered up to them. An interim injunction was granted after argument restraining the publication until the trial of the action.

The defendant, Macdonald, appealed against this order, and upon his appeal coming before the Divisional Court, all parties consented to its being turned into a motion for judgment.

On the motion for judgment the defendant Lear appeared by his counsel and consented to the judgment asked for by the plaintiffs.

The defendant, Macdonald, appeared in person and argued that the public interest required that he should be permitted to use the letters in support of his petition to the Legislature, and that at all events no order should be made which should interfere with the use of the documents in any criminal prosecution or parliamentary enquiry.

Judgment
Street, J.

The papers before us contain copies of the documents in question. They contain nothing which upon any possible construction can be treated as incriminating the writer, and the allusions to the offences of others are of the vaguest character. They are of course in themselves, under these circumstances, not evidence against any person. Why then should we treat them as exceptions to the general rule in such cases?

The documents themselves are confessedly the property of the plaintiffs, from whose custody they have been taken by a shameful breach of trust, of which the defendant, Macdonald, must have been aware. They have been submitted by the defendant, Macdonald, to the law officers of the Crown, who have refused to have anything to do with them or with the matters referred to in them.

The defendant, Lear, has consented to the judgment asked for. The defendant, Macdonald, should not be permitted to detain the plaintiffs' property from them any longer, upon the mere suggestion that it may be useful in bringing to justice alleged criminals whom the Crown refuses to prosecute. I concur in the form of the judgment proposed by my Lord the Chief Justice.

G. A. B.

[DIVISIONAL COURT.]

RE MCINNES V. MCGAW.

Receiver—Equitable Execution—Interest under Will—Interference with Discretion of Executors—Prohibition—Division Court.

The mother of the judgment debtor by her will empowered her executors, if in their discretion they should see fit, to pay the income of her estate, in part or in whole, to and for his benefit and advantage, at such time and in such manner and sums as they should see fit, leaving it to their option and discretion whether they should pay him any sum.

An order was made in a Division Court action, after judgment, appointing the judgment creditor receiver to receive the amount of his judgment from the executors, whenever they should exercise their discretion to pay the judgment debtor the amount of the judgment, or any part thereof.

Prohibition was granted against the enforcement of this order :—

Held, following *The Queen v. Judge of County Court of Lincolnshire* (1887), 20 Q. B. D. 167, that if the order was intended to interfere with the action of the executors, it should not have been made; and if it did not so interfere, it was nugatory.

Statement.

MOTION by the executors of the will of the late Christina Sisson for an order prohibiting the Judge of the County Court of the county of Ontario, the clerk of the 3rd Division Court in that county, and the plaintiff in the above action in that Court, from enforcing an order made by the Judge on the 6th August, 1898, in the action, whereby he appointed the plaintiff (who had judgment against the defendant in the Division Court for the recovery of money) receiver, without security, to receive the amount of his judgment from such executors “when-ever the said executors exercise their discretion to pay the defendant, the judgment debtor, the amount of the judgment or any part thereof.”

By her will Christina Sisson empowered her executors, if in their discretion they should see fit so to do, to pay to or for the benefit and advantage of her son (the judgment debtor), at such time and in such manner and in such sums as they might see fit, in part or in whole, the interest or rents of her estate, leaving it to their option and discretion whether they should pay him any sum.

The motion was heard by MEREDITH, C. J., in Chambers, Statement.
on the 2nd September, 1898, and an order was made by him on the 12th September, 1898, granting prohibition as asked, without costs.

The judgment creditor appealed from the order, and his appeal was heard by a Divisional Court composed of BOYD, C., and ROBERTSON, J., on the 5th October, 1898.

W. J. Elliott, for the judgment creditor. A receiver may be appointed to receive a fund in which the debtor may have an interest; the order made in this case does not interfere with the executors' discretion. I refer to *Webb v. Stenton* (1883), 11 Q. B. D. 518; *Fuggle v. Bland* (1883), *ib.* 711; *Westhead v. Riley* (1883), 25 Ch. D. 413; *Lord v. Bunn* (1843), 2 Y. & C. Eq. 98; *McLean v. Bruce* (1891), 14 P. R. 190; *Stuart v. Grough* (1888), 15 A. R. 299.

Shepley, Q. C., for the executors. A receiver cannot be appointed to receive this money. The order is an interference with the discretion given by the testatrix to her executors: *The Queen v. Judge of County Court of Lincolnshire* (1887), 20 Q. B. D. 167. A receiver can be appointed only where the money could be attached but for some impediment to execution at law: *Holmes v. Millage*, [1893] 1 Q. B. 551; *Cadogan v. Lyric Theatre (Ltd.)*, [1894] 3 Ch. 338; *Harris v. Beauchamp*, [1894] 1 Q. B. 801; *Fisken v. Brooke* (1879), 4 A. R. 8.

December 12, 1898. BOYD, C.:—

The Queen v. Judge of County Court of Lincolnshire (1887), 20 Q. B. D. 167, is in point, and shews that the order should not be made or acted on if it is intended to interfere with the action of the trustees. If it does not so interfere, it is nugatory and perhaps embarrassing.

Altogether, the appeal should be dismissed, but it is not a case for costs.

ROBERTSON, J.:—

I concur.

E. B. B.

RE CARBERY.

Life Insurance—Benefit of Wives and Children—Apportionment—Will—Abatement.

A testator had three policies upon his life, each for \$2,000, payable to his wife and children; and, had no change been made, they would have been entitled to the whole sum in equal shares. By his will he gave a specific portion of the \$6,000 to each of eight of his nine children, some of the portions being more and some less than \$600, the total given being \$5,100; but said nothing as to his wife or remaining child.

By sec. 160 of the Ontario Insurance Act, he had power to "make or alter the apportionment:"—

Held, that what he did by his will was a reapportionment; and the former apportionment remained, except in so far as it was changed by the reapportionment. Had the policies all been good, each of the eight children would have been entitled to the specific sum given him or her by the will, and the wife and the remaining child would have been entitled, by virtue of the original apportionment in their favour, varied by the reapportionment, to the \$900 balance, divided between them equally. But, as one of the policies turned out to be worthless, and there was only \$4,000 to distribute, the sum going to each of the beneficiaries must abate in due proportion.

Statement.

THIS was an application by Emma Carbery for an order for payment out of Court to her of her share of a sum of \$4,000 arising from two insurance policies upon the life of her father, Thomas Carbery, who died on the 20th July, 1898, leaving a will dated the 25th June, 1897, by which he disposed (*inter alia*) of the sum of \$6,000, being the aggregate amount of three policies on his life, as follows:—
 "My life insurance, consisting of \$2,000 in the Confederation Life Association, \$2,000 in the United Workmen, and \$2,000 in the Select Knights of Canada, I give and bequeath as follows: To my son William, \$500; to my daughter Charlotte McLaren, \$200; to my son James, \$500; to my daughter Eliza Collier, \$800; to my daughter Mary Elizabeth McFaul, \$500; to my daughter Emma, \$800; to be paid to them as soon as conveniently can be after my decease; to my son Charles Edward, \$1,000, to be paid to him at the end of four years after he becomes of age; and to my daughter Edith, \$800, to be paid to her when she becomes of age."

These amounts aggregated \$5,100. The testator made no disposition of the remaining \$900, and made no mention in connection with the insurance moneys of his wife or of his remaining child, Thomas Evans Carbery. Statement.

All the policies were on their faces made payable to the wife and children of the assured, and no other disposition was made of the moneys than that made by the policies themselves, and that subsequently made by the will.

One of the policies turned out to be worthless, and the sum to be distributed was, therefore, only \$4,000.

The motion was heard by FERGUSON, J., in Chambers, on the 19th December, 1898.

W. L. Walsh, for the applicant, contended that as the amount actually disposed of by the will exceeded \$4,000, the sum to be distributed, the whole \$4,000 should be divided ratably among the eight; or that the \$900 undisposed of by the will should be divided equally among the widow and nine children; with a proportionate abatement.

F. W. Harcourt, for the two infant children of the testator, supported this contention.

R. McKay, for the widow and the son Thomas Evans Carbery, argued that the \$900 should be equally divided between these two, and then a proportionate abatement made, upon the footing of the sums mentioned in the will and \$450 to the widow and \$450 to Thomas. He referred to *Re Lynn* (1891), 20 O. R. 475; *Re Cameron, Mason v. Cameron* (1892), 21 O. R. 634; *Re Grant* (1895), 26 O. R. 120, 485.

December 20, 1898. FERGUSON, J.:—

The testator had three policies upon his life, each being for the sum of \$2,000, making in all the sum of \$6,000. By each of the policies the money was made payable to the wife and children, and they would accordingly, if no change had been made, have been entitled in equal shares

Judgment. to the whole of the money. There were nine children.
Ferguson, J. There were then ten persons to receive as beneficiaries these insurance moneys, and, had the policies all been good, these ten beneficiaries would have been entitled each to the sum of \$600 of the moneys.

The testator by his will seems to have dealt with these insurance moneys as if they had been his own and part of his personal property, and he gave a specific sum to each of eight of his children ; some of the sums so given being more and some less than \$600, the total given in this way being \$5,100. In doing this the testator said nothing as to his wife or the other child. The power that the testator had was to make or alter the apportionment of the moneys, and what he did by his will was, as I think, a reapportionment of them. Assuming this to be so, the former apportionment would remain, except so far as it was changed by the reapportionment. After giving to each of the eight children the specific sum mentioned in the will to go to him or her, there would be left of the sum of \$6,000 the sum of \$900, the total sum given to the eight by the will being \$300 more than would have been coming to them under the even apportionment by the provisions of the policies, and the \$900 being \$300 less than would have been coming to the wife and remaining child under the same apportionment. The view that I have taken and the opinion I have arrived at is, that, had the policies all been good, each of the eight children would have been entitled to the specific sum given him or her by the will, and that the wife and the other child would have been entitled, by virtue of the original apportionment in their favour, varied by the reapportionment, to the \$900 between them equally, that is to say, to \$450 each.

One of the policies, however, turned out to be worthless, and there is the sum of \$4,000 only, instead of the \$6,000, and the consequence is, I think, that the sum going to each of the ten beneficiaries must abate accordingly in due proportion.

There may be an order for the payment to Emma Car- Judgment.
 bery, the applicant, of her proper proportion according to Ferguson, J.
 the above disposition.

Others may come in for similar orders, or may be included in this order on the settling of it.

E. B. B.

RE TRUSTEES OF SCHOOL SECTION ELEVEN, AMARANTH,
 ET AL. AND
 COUNTY OF DUFFERIN.

*Public Schools—Union School Section—Alteration of Boundaries—Five
 Years' Limit—R. S. O. ch. 292, secs. 38, 43, 44.*

In 1897 a township council passed a by-law altering the boundaries of an existing school section, and this was affirmed by the county council on appeal. In 1898 the county council, on appeal from the refusal of the township council to do so, appointed arbitrators to consider the advisability of forming a union school section from parts of the section in question and of another section, and an award was made setting apart the new union school section, and thereby making material alterations in the boundaries of the existing section :—

Held, that although the by-law of 1898 was passed under secs. 43 and 44 of the Public Schools Act, R. S. O. ch. 292, it came within the prohibition of sec. 38, sub-sec. 3, which required that the by-law of 1897 should remain in force for five years ; and therefore the by-law of 1898 was quashed and the award set aside.

THIS was an application by the school trustees and Statement.
 William Daly, a ratepayer in the school section, for a summary order quashing by-law No. 235 of the county of Dufferin, passed by the county council on the 22nd June, 1898, and also setting aside an award made by virtue of such by-law.

The by-law in question was one appointing arbitrators to determine an appeal from the refusal of the councils of the townships of Amaranth and East Luther (upon petition to the councils for that purpose) to appoint arbitrators, pursuant to sec. 43 of the Public Schools Act, R. S. O. ch. 292, to consider the advisability of forming a union school section from parts of section 11 in Amaranth and section 5 in East Luther.

Statement.

The award in question was made pursuant to the by-law, and purported to form the new school section.

On the 29th May, 1897, the municipal council of the township of Amaranth passed a by-law (numbered 285) to alter the boundaries of several school sections in the township, and amongst others those of section 11. This by-law was affirmed by the county council on appeal.

The main ground of objection to the by-law now in question was that the county council had no jurisdiction to make it, because of the alteration of the boundaries in 1897, and the provisions of the Act, secs. 38 and 52, to the effect that boundaries cannot be altered again for five years.

The following provisions of R. S. O. ch. 292 are those which bear on the question:—

43. A union school section may be established between (a) parts of two or more adjoining townships * * and union school sections may be formed, altered or dissolved as follows:—

1. On the petition of five ratepayers from each of the municipalities concerned, to their respective municipal councils, asking for the formation, alteration or dissolution of a union school section, each municipal council may appoint an arbitrator * *.

44. Where the territory which it is proposed to form into a union school section * * lies wholly within a county, the trustees or any five ratepayers in the territory * * may within one month after the making thereof appeal in writing to the county council * * against the neglect or refusal of the township council * * to appoint arbitrators * *.

38. Every township council shall have power:

1. To pass by-laws to unite two or more sections in the same township * *.

2. To alter the boundaries of a school section, or divide an existing section * *, or to unite portions of an existing section with another section, or with any new section * *.

3. Any such by-law shall not be passed later than the first day of June in any year, and shall not take effect before the 25th day of December next thereafter, and shall remain in force, unless set aside as hereinafter provided, for a period of five years * *.

52.—(1) Any by-law of a municipality for forming, altering or dissolving a school section or sections, and any award made by arbitrators appointed to consider an appeal from a township council * * shall be valid and binding for a period of at least five years * *.

The motion was heard by FERGUSON, J., in Court, on the 21st December, 1898.

Aylesworth, Q.C., for the applicants, referred to *Re Martin and County of Simcoe* (1894), 25 O. R. 411; *In re Union School Section East and West Wawanosh* (1895), 26 O. R. 463; *Union School Section of East and West Wawanosh and Hullett v. Lockhart* (1895-6), 26 O. R. 662, 27 O. R. 345.

W. L. Walsh, for the county council. The township by-law of 1897 is still in force, and the alterations made by it are still in force. What the county council has done is not to alter the boundaries of section 11, but to make a new union school section, which is quite a different thing. *Re School Section 16, Township of Hamilton* (1898), 29 O. R. 390, is conclusive against the application. The procedure here is not under sec. 38, but 43, and the appeal is not under 39, but 44. The applicants' delay disentitles them to succeed: *In re McAlpine and Township of Euphemia* (1880), 45 U. C. R. 199; *Harrison's Municipal Manual*, p. 242.

Aylesworth, in reply, referred to *Re Powers and Township of Chatham* (1898), 29 O. R. 571.

December 24, 1898. FERGUSON, J.:—

The board of public school trustees for school section No. 11 in the township of Amaranth, and a farmer and ratepayer in said section, move for an order that this

Judgment. by-law, which was passed on the 22nd day of June, 1898, Ferguson, J. appointing arbitrators to determine an appeal from the refusal of the council of the township of Amaranth and the council of the township of East Luther to appoint arbitrators, pursuant to sec. 43 of the Public Schools Act, to consider the advisability of forming a union school section from parts of school section No. 11 in Amaranth and section No. 5 in East Luther, and also appointing arbitrators to determine an appeal from the refusal of the council of the village of Grand Valley to appoint an arbitrator to consider the advisability of altering the boundaries of union school section No. 2, East Luther, Amaranth, and Grand Valley, be quashed for illegality in so far as it relates to school section No. 11 in the township of Amaranth, and that the award, dated the 27th day of August, 1898, made by Nathaniel Gordon, William Jolly, and Maitland McCarthy, the arbitrators appointed by said by-law, be set aside.

The grounds upon which the motion is made are, amongst others, that:

1. The boundaries of the said school section No. 11 Amaranth, having been duly fixed by by-law of the township of Amaranth, No. 285, dated the 29th May, 1897, and affirmed by the county council in or about the month of June following, these boundaries of the said section 11 became thereby fixed and valid and binding for the period of five years thereafter.

2. That the said award illegally and unjustly determined and ordered that the land or lots included in the union school section thereby formed, and any ratepayer so affected by the award, should be freed and discharged from any debt, charge, debenture, or other debt or obligation incurred by or liable to school section No. 11, Amaranth, or any debt or claim connected therewith, from and after the date the award should go into effect, thereby relieving the ratepayers of that part of said section 11 placed in the new union section, from payment of their share of debentures charged against said section 11 for the building of a new school house in the year 1897.

The by-law No. 285 of the township of Amaranth, Judgment.
passed on the 29th day of May, 1897, is a by-law to alter Ferguson, J.
the boundaries of several school sections in the township,
and amongst others the boundaries of the school section
11, and by it no less than four changes or alterations are
made in the boundaries of this section No. 11. The making
of these changes or alterations in the boundaries of the
section seems to me necessarily to operate an adoption
and confirmation of the boundaries of the section, in other
respects, then existing.

Sub-section 2 of sec. 38 of the Act gives the township the power, amongst other powers, to alter the boundaries of a school section in the township. The power is exercised by by-law. Sub-section 3 of the same section provides, amongst other things, that such by-law shall remain in force, unless set aside, etc., for a period of five years, and during this period the township had no power to repeal it: *Re Powers and Township of Chatham* (1898), 29 O. R. 571. There being no power to repeal the by-law, it plainly follows, as I think, that there was not power so to legislate as to effectually repeal it in part. Besides, the provision seems plain and imperative that it shall remain in force for the five years. When the council of Amaranth were asked by the petition of the 2nd day of April, 1898, to take the steps that would be necessary for them to take for the formation of the union school section, it was manifest that the formation of the union school section proposed would very materially alter the boundaries of said section 11, and they declined to take such steps. It seems that the council of East Luther also declined. On the 11th day of June, 1898, an appeal signed by certain ratepayers of Amaranth and of East Luther was lodged. This appeal was to the county council, and was professedly under the provisions of sec. 44 of the Act, and the county council were asked by a petition, signed by no less than thirty-one ratepayers in school section No. 11 of Amaranth, not to take any steps, not to interfere in the matter, the petitioners stating

Judgment. reasons at some length. The county council, nevertheless, Ferguson, J. proceeded to pass, and did pass, the by-law in question appointing arbitrators, who afterwards made the award now sought to be set aside.

After having consulted the authorities referred to by counsel and considered the provisions of the Act bearing upon the questions raised, I have arrived at the opinion that when the council of Amaranth were asked by the petition of the 2nd April, 1898, to act in or towards the formation of the union school section in the petition designated, they had not, owing to the existence of their by-law No. 285, notwithstanding the apparently comprehensive provisions of sub-sec. 1 of sec. 43 of the Act, power to comply with the request made, and the provisions of sub-sec. 3 of sec. 38 are as binding upon the county council as upon the township council. Besides, the appeal could not have the effect of creating the power when the body appealed from did not possess it. The union school section defined by the award (as well as the one proposed by the petitions) makes most material alterations in the boundaries of this school section 11 in Amaranth.

The clause in the award, that the lands included in the union section formed by the award and the ratepayers affected by the award shall be freed and discharged from any debt, charge, debenture, or other obligation incurred by or liable to school section 11, Amaranth, or any debt or claim connected therewith, after the date of the award going into effect, is, as I think, quite contrary to the provisions of sub-sec. 3 of sec. 70 of the Act.* In respect to this, I was asked to refer the award back to the arbitrators under the provisions of certain clauses in the Arbitration Act. It would be useless to do this, as, in my opinion, neither the by-law attacked nor the award can stand.

* 70—(3) Notwithstanding any alteration which may be made in the boundaries of any school section, the taxable property situated in the school section at the time when such loan was effected, shall continue to be liable for the rate which may be levied by the township council for the repayment of the loan.

There are other grounds stated as grounds of this Judgment. motion; but, being of the opinion that the by-law should Ferguson, J. be quashed, and that the award must fall with it, on the grounds and for the reasons to which I have referred, I need not refer to these others or discuss them.

There will be an order quashing the by-law so far as it relates to or affects school section 11, Amaranth, and setting aside the award, and the costs will follow.

E. B. B.

[DIVISIONAL COURT.]

RE THOMAS AND SHANNON.

Will—Devise—Restraint on Alienation—Repugnancy—Invalidity—Contingent Executory Interest—Remoteness—Perpetuities.

In the early part of a will, lands were devised to the vendor, a son of the testator, in fee, and other lands were devised to other children, but in the latter part of the will there was this clause: "It is fully understood that my children have no power to make sale or mortgage any of the lands mentioned, but to go to their heirs and successors * * * Should any of my children die childless leaving husband or wife, said husband or wife to have a third during the term of their natural life:"—

Held, that the first part of this clause amounted to a total restriction upon alienation, and was repugnant to the nature of the estate given by the devise, and was therefore void.

Held, that the words "die childless" in the last part of the clause should be taken to mean "die not having children or a child living at the time of such death," and this part of the clause created a contingent executory interest or estate of freehold, which, from its legal nature, would, upon the contingency happening in its favour, spring up into existence.

Held, also, that although many children of the vendor were living, none of whom was born till many years after the testator's death, and all of whom must die before the executory interest could take effect, yet the gift was not too remote, and did not infringe upon the rule against perpetuities.

A PETITION by James Thomas, the vendor, under the Statement. Vendors and Purchasers Act, for an order declaring that he could make a good title to certain lands in the township of Haldimand, which he had contracted to sell to Robert Samuel Shannon.

Statement. The main objections to the vendor's title were, that under the will of his father, by which he derived title to the lands, there was a valid restraint upon alienation, and also a contingent estate in remainder. The facts are fully stated in the judgment.

The petition was heard by FERGUSON, J., in Court, on the 22nd December, 1898.

Clute, Q.C., for the petitioner, argued that the attempted restraint on alienation was void, and that the contingent estate given was in contravention of the rule against perpetuities, citing Wharton, 9th ed., 559; Jarman on Wills, 5th ed., pp. 251, 252.

E. D. Armour, Q.C., for the purchaser. The restraint is valid: *Earls v. McAlpine* (1881), 6 A. R. 145; *Re Winstanley* (1884), 6 O. R. 315. A restraint in part is good: *Chisholm v. London and Western Trusts Co.* (1897), 28 O. R. 347. The cases in our own Courts must be followed: *Re Weller* (1888), 16 O. R. 318. All the cases are collected in an article in 17 C. L. T. at pp. 106, 107. The rule against perpetuities has not been infringed upon; the rule does not apply; there is a good contingent remainder. In a similar case the title was not forced: *Nason v. Armstrong* (1892-4), 22 O. R. 542, 21 A. R. 183, 25 S. C. R. 263.

Clute, in reply, referred to *White v. Hill* (1867), L. R. 4 Eq. 265.

December 28, 1898. FERGUSON, J. :—

This is a petition under the provisions of the Act commonly known as the Vendors and Purchasers Act.

The petition is by James Thomas, the vendor, or intended vendor. The case arises in the usual way, upon an abstract of title and requisitions made in respect thereof, the purchaser, or intending purchaser, being Robert Samuel Shannon.

The lands are the west half of lot number eighteen in

the sixth concession of the township of Haldimand, except seven acres thereof sold before the making of the will under which the vendor claims, and the south-east quarter of lot number seventeen in the seventh concession of the same township.

Judgment.
Ferguson, J.

The petitioner, the vendor, derives title under the last will of his father, who was also named James Thomas. In the early part of the will those lands are devised to this vendor in fee, subject to the payment of certain legacies. These legacies are, however, not a subject of contention here. The will contains other devises to children of the testator, and in the latter part of it is this clause: "It is fully understood that my children have no power to make sale or mortgage any of the lands mentioned, but to go to their heirs and successors, save and except lot number eight concession 'A,' which is willed above to my son James, his heirs and assigns. Should any of my children die childless leaving husband or wife, said husband or wife to have a third during the term of their natural life."

The central part of this clause plainly relates only to the lands in concession "A," and there is no contention here in regard to it.

There is a contention as to the first part of the clause, and another contention as to the last part of it.

The clause, no doubt, applies to the devise of the lands in question here; and, after having heard much argument on the subject and perused the cases referred to, I have arrived at the conclusion that the first part of the clause amounts to and is what is called a total restriction upon alienation, and is repugnant to the nature of the estate given by the devise (an estate in fee), and therefore void. It not only restricts against selling and mortgaging, but provides and directs that the lands be kept in the hands of the devisee to go to and devolve upon his heirs, which last clearly, as I think, restricts against a disposition of the lands by the last will of the devisee.

The cases do not seem to me to be uniform, but, after

Judgment. being at some trouble on the subject, I think that such is Ferguson, J. the proper conclusion.

As to the contention respecting the last part of the clause, I think, though no direct authority was referred to on the subject, that the words "die childless" should be taken to mean, die not having children or a child living at the time of such death. Then, taking this last part of the clause as it operates upon these lands devised in fee to James Thomas, as above, it means that should James so die childless, leaving him surviving a widow, then such widow shall be entitled to a one-third interest in the lands during the term of her natural life.

This is the creation of a contingent executory interest or estate of freehold, which from its legal nature would, upon the contingency happening in its favour, spring up and into existence, thus defeating, so far as might be necessary for its existence and duration, the estate in fee given to the vendor, James Thomas, in the former part of the will.

The case presented shews, and it was stated in the argument without contradiction, that James Thomas has now a large number of children who are living, and that his present wife is quite willing to join in the proposed conveyance pursuant to this contract of purchase and sale. A conveyance properly drawn and executed would, no doubt, pass her contingent interest to the purchaser. This, however, does not put an end to the contention or difficulty—the objection—because it is plainly possible that a future wife of James Thomas may survive him, his children being, at the time of his death, all dead. In such case he would "die childless," leaving a wife or widow, and the contingency would have happened in favour of the executory estate or interest, if the meaning that I have given the words "die childless" is the correct one.

There was a contention that the fact of so many children of James Thomas being now living, none of whom were born till many years after the death of the testator, and all of whom must die before the executory interest could

take effect, shewed that the executory gift is too remote, and infringes upon the rule against perpetuities. I do not think this argument a sound one. The gift, if it takes effect at all, must do so immediately upon the death of James Thomas, a person who was living at the time of the making of the will, at the date of the death of the testator, and who is still living. This cannot, as I think, be too remote. The existence of those children of James Thomas only renders it less probable, in fact, that the contingency will happen in favour of the executory interest. The will must be construed as it would have been construed before the birth of any of such children. It has had the same legal meaning ever since the day of the death of the testator to the present time.

Judgment.
Ferguson, J.

There were some differences respecting discharges of certain mortgages, but counsel finally said that if it turned out that these were the only trouble, they could and would agree about them, so that I need not discuss them.

Finally, I am of opinion that the restriction against alienation is a total restriction, and therefore void, and this alone would not prevent the vendor from imparting a good title to the purchaser. But that the executory interest above spoken of is good, though depending upon a contingency that very probably will not happen in favour of the interest; yet, as a matter of law, is a good reason why the vendor cannot, even though his present wife join in the conveyance, impart a good and clear title in fee simple to the purchaser. I do not think the long and continued possession and occupation of the vendor, James Thomas, makes any difference in his favour.

The vendor cannot make a good title to the purchaser. The vendor will pay the purchaser's costs of and incidental to the petition.

An appeal by the vendor from this decision was argued by the same counsel before a Divisional Court composed of ARMOUR, C.J., and STREET, J., on the 17th February, 1899, and was dismissed with costs.

[DIVISIONAL COURT.]

McRAE v. McRAE ET AL.

Will—Restraint on Alienation—Invalidity.

Devise of real estate to a son with a condition as follows : “ But I direct that before my said son * * shall sell, mortgage, trade or dispose of, or encumber the said property or any part thereof, or any farm produce or timber, that he shall first obtain the consent of my sister * * ” :—

Held, that the restriction being against all kinds of alienation, and in that regard absolute and unlimited, as the required consent was a condition precedent to any kind of alienation and unlimited as to time, the restraint was void.

Judgment of FALCONBRIDGE, J., reversed, MEREDITH, J., dissenting.

Per MEREDITH, J.—The restraint on alienation is limited in point of time to the sister's lifetime and so valid, following *Earls v. McAlpine* (1881), 6 A. R. 145.

Statement.

THIS was an appeal from a judgment of FALCONBRIDGE, J., at the trial.

The action was brought by Mary McRae for payment of a legacy and for a declaration of her rights under the wills of her father, Finnen McRae, and her brother, Archibald McRae, against John McRae and Duncan Angus McRae, the executors of Archibald McRae. The will of Finnen McRae, who died in the year 1896, was never proved.

Duncan Angus McRae was a son of Archibald McRae, and was a devisee of certain land and farm stock under his father's will as well as one of the executors named in it.

In the will of Archibald McRae was contained a clause by way of restraint on alienation in these words, “ I direct that before my said son Duncan Angus shall sell, mortgage, trade, or dispose of or encumber the said property or any part thereof, or any farm produce or timber, that he shall first obtain the consent of my sister Mary McRae,” the plaintiff.

The defendant Duncan Angus McRae, in his statement of

defence, claimed that the restraint on alienation in his father's will was void, and asked to have it declared that he took the property freed from it. Statement.

The action was tried at Cornwall on March 28, 1898.

James Leitch, Q.C., and *R. A. Pringle*, for the plaintiff.
J. G. Harkness, and *J. A. C. Cameron*, for the defendants.

The following cases were cited: *Gallinger v. Farlinger* (1857), 6 C. P. 512; *Re Winstanley* (1884), 6 O. R. 315; *In re Rosher*, *Rosher v. Rosher* (1884), 26 Ch. D. 801; *Heddlestone v. Heddlestone* (1888), 15 O. R. 280; *Earls v. McAlpine* (1881), 6 A. R. 145; and judgment was reserved.

April 16, 1898. FALCONBRIDGE, J.:—

Earls v. McAlpine (1881), 6 A. R. 145, is in point, and the restraint on alienation in clause one of Archibald McRae's will is valid.

From this judgment the defendant Duncan Angus McRae, appealed on the ground that the restraint on alienation substantially took away the whole power of alienation of the property, and was therefore invalid; and the appeal was argued on May 3, 1898, before a Divisional Court composed of FERGUSON, ROBERTSON, and MEREDITH, JJ.

J. G. Harkness, for the appeal. The words are comprehensive and the restraint is unlimited both as to time and as to all kinds of alienation, and therefore void. There is no doubt that every manner of alienation is prohibited, and the only possible question is, Was the time limited to the lifetime of Mary? Even if it was, it would be invalid under the authorities: *In re Rosher*, *Rosher v. Rosher* (1884), 26 Ch. D. 801; *Renaud v. Tourangeau* (1867),

Argument. L. R. 2 P. C. 4; *Heddlestone v. Heddlestone* (1888), 15 O. R. 280. The language used here is wider than that used in *Earls v. McAlpine* (1881), 6 A. R. 145. There the land went to the heir-at-law. Here the devisee is the heir-at-law. There the restraint was confined to real estate. Here it is extended to farm produce. I refer also to *Re Shanacy v. Quinlan* (1897), 28 O. R. 372.

James Leitch, Q.C., contra. The settled rule as to restraints on alienation is, that if the condition does not take away the whole power of alienation, it is good: *In re Macleay* (1875), L. R. 20 Eq. 186. But *Earls v. McAlpine* (1881), 6 A. R. 145, is directly in point. There the consent required was similar to that required in this case, and the restraint was held to be limited to the lifetime of the party, and consequently valid. See also *Re Weller* (1888), 16 O. R. 318.

J. G. Harkness, in reply.

November 4, 1898. FERGUSON, J.:—

As to the first ground of appeal, I am of the opinion that the restraint upon alienation is absolute. It is against selling, mortgaging, trading, disposing of or encumbering the property given or any part thereof without first obtaining the consent of Mary McRae. The property given was composed of realty and various kinds of personalty.

The restriction plainly appears to be against *all* kinds of alienation and is in this regard absolute and unlimited, and I can see no sufficient ground for thinking, that it is in time limited to the lifetime of Mary McRae, and there seems no other period of time to which it could be contended that it is limited. The required consent is a condition precedent to any kind of alienation of the property or any part of it and, as I think, unlimited as to time. I think the decision referred to and relied on by the learned Judge *Earls v. McAlpine* (1881), 6 A. R. 145, is not in point, and in my opinion the restriction is void and of no effect.

ROBERTSON, J. :—

Judgment.

Robertson, J.

I have had much difficulty in coming to a conclusion quite satisfactory to myself, as to whether the restraint upon alienation is valid.

After much consideration I am of opinion that *Earls v. McAlpine* (1881), 6 A. R. 145, is not in point, and affords no authority for holding in this case, that the restraint here is of a limited character, as it was held to be in that case—to the lifetime of the widow.

It may be that the testator had in his mind, that his son Duncan Angus, might die without leaving issue, him surviving; in which case by a subsequent provision in the will the estate would go to his sister, Mary, this plaintiff, and that he, the testator, did not wish a stranger to come in without her consent; but that could not affect the estate created by the devise in favour of Duncan Angus, nor could the alienation of that estate affect the contingent interest of Mary.

On the whole, therefore, I think the reasoning of my brother Ferguson is right, and I concur in his judgment on this ground of appeal.

MEREDITH, J. :—

The words in question are: "I direct that before my said son, Duncan Angus, shall sell, mortgage, trade or dispose of or encumber the said property or any part thereof, or any farm produce or timber, that he shall first obtain the consent of my sister Mary."

The first question that occurred to me was, whether these words are enough to create a restraint on alienation; but this point was not argued or mentioned; and as the words in question in *Earls v. McAlpine* (1881), 6 A. R. 145, were substantially the same, we would be, I presume, bound by that case to hold, that they are, though, but for it, I would have desired an argument of the point.

Then, assuming that they do create a restraint on alien-

Judgment. ation, they amount to a common law condition, pure and
Meredith, J. simple, and the one question is, whether they are invalid
as being repugnant to the quality of the estate devised or
not.

The point is certainly a difficult one, and one likely to cause expressions of regret that the rule, that conditions in restraint of alienation are invalid, was ever departed from, or else ever made. Certainly, the cases make it very hard to say where the line is to be drawn between good and bad conditions, especially the case *In re Macleay* (1875), L. R. 20 Eq. 186, and the more recent cases in our own courts, most of which seem to me to be really based upon the judgment of the Master of the Rolls in that case. It may not be difficult to consider whether a condition is or is not a restraint on alienation; it must be difficult, if not impossible, in some cases, to consider whether or not a condition takes away, in substance, the whole power of alienation.

In this particular case, assuming that there is no limitation as to time, it seems to me impossible to determine whether or not the whole power of alienation is in reality taken away, for that depends upon the mental condition of the woman, whose consent is required, at the time the consent is sought.

She may then be a sensible woman, in a sensible mood, and so willing to consent to any alienation the devisee may reasonably desire, and, if so, the restraint would actually be upon his possible improvidence only; or she may then be narrow-minded, obstinate and capricious, and unwilling to consent to anything, however reasonable the request, or however urgent the need; and, if so, the restraint would actually be upon the whole power of alienation, that is, would, in fact, wholly prevent any exercise of it.

We have no evidence of her character or disposition, past or present. Are we to guess at what she may do or how she may act, if, at any time in the future, asked for

her consent. And, if ever so much evidence had been given as to her character or disposition, could we safely say what she might in the future be or do ?

Judgment.

Meredith, J.

Or are we to regard, not the substance, the reality of the thing, but the form of it, and say whether or not, the mere words amount to a whole or partial restraint, contrary to the opinion of the Master of the Rolls, expressed in the *Macleay* case? If so, in one sense at all events, it could be said that the condition is a restraint upon the whole power of alienation.

One can promptly say that the requirements of such consent are a substantial restraint upon alienation, but no one can do more than guess, whether or not, they will take away the whole power of alienation substantially.

The inclination of my mind would be to hold the condition in question, whether limited to the lifetime of the woman or not, a restraint upon alienation, repugnant to the quality of the estate devised, and therefore void.

But we are prevented, I think, by the case of *Earls v. McAlpine*, decided by the Court of Appeal for this Province in the year 1881, 6 A. R. 145, from giving effect to our own opinions upon the question, if not in accord with the judgment in that case, which seems to me directly in point and decisive of this case in favour of the validity of the condition, if limited to the lifetime of the woman.

In that case, the words of the will were: "I also will that my * * sons * * do not sell or transfer the said property without the written consent of my beloved wife during her natural life," and they seem to have been taken for granted throughout to mean that there should be no sale or transfer during the widow's life without her consent, not that there should be no sale except upon her consent, obtained during her life, as perhaps their literal meaning is. All of the Judges seem to have been of the opinion, that this was but a partial, and a valid, restraint, because limited as to time; and so we are by that case bound to hold this restraint, if limited to the woman's lifetime, valid, notwithstanding the

Judgment. directly opposite holding in *In re Rosher, Rosher v. Rosher* Meredith, J. (1884), 26 Ch. D. 801, and perhaps to a good deal said in *Renaud v. Tourangeau* (1867), L. R. 2 P. C. 4, and, I think, to the weight of authority: see *Corbett v. Corbett* (1888), 14 P. D. 7.

I have no difficulty in reaching the conclusion, that upon the proper construction of this will, the restraint is limited to the woman's lifetime. Why are we to consider the restraint is forever? The testator has not said that the devisee shall never sell, mortgage, trade, or dispose of or encumber, the property without such consent; he has said merely, that before selling, trading, or disposing of any of the property, his son shall first obtain his sister's consent, and that, to my mind, imports a restriction as extensive only as the power to remove it. I cannot think that we are bound to read the will just as if the testator had said "there shall be no sale, etc., after my sister's death without her consent." Yet, it must be so read if the restriction is to continue after her death. Why should we interpret the testator's words so as to nullify his intentions? Why read them as requiring something invalid, if it is possible to read them as requiring something valid?

But the matter seems to me to be concluded by the fact, that, if we hold the restraint unlimited as to time, then we accuse the testator of having said that the devisee, his son, shall, before selling, trading, or disposing of the produce raised upon the farm from time to time and from year to year after the death of the testator's sister, first obtain her consent to so sell, trade, or dispose of it. I cannot accuse him of having made so obviously absurd a provision; I cannot but think he gave credit to those who might read his will for a more reasonable understanding of his words. I, therefore, agree with the learned trial Judge (upon the words in question alone without seeking any aid from the other portions of the will, shewing the testator's reasons for restraining alienation) in his opinion that the restraint on alienation is limited, in point of time, to Mary McRae's lifetime; and that the authority of the case of *Earls v.*

McAlpine, compels us to hold it, so limited, to be a valid condition. Judgment.

Meredith, J.

In all other respects, upon the somewhat meagre and none too well directed evidence in the case, I agree in the judgment of this Court.

Since writing this opinion my attention has been called to the following observations contained in the 2nd edition of Gray on Restraints on Alienation, at p. 41 :—

“ Since the full discussion and the decision in *Mandlebaum v. McDonnell* (1874), 29 Mich. 78, followed and approved by *Re Rosher*, and *Potter v. Couch* (1891), 141 U. S. R. 296, it is probably safe to say, that the invalidity of restrictions against alienation of fees simple, though limited in time, is now established, except in the Province of Ontario.”

And on page 40, referring to *Earls v. McAlpine* : “ The words of the will were simply, ‘ I will that my sons,’ etc. The Judges found great difficulty in construing this into a condition ; it is surprising that they felt able to do so.”

G. A. B.

HIGGINSON ET AL. V. KERR ET AL.

Will—Construction—Legacy—"Cousins"—Indefinite Disposition—Trust—Power of Appointment—General Power.

The testator died a bachelor, leaving no relations nearer than first cousins.

By his will he gave certain specific legacies, one of which was, by clause 7, "to each of my cousins" the sum of \$1, and proceeded:—

"9. I desire that my executors * * shall have full power to make such and any disposition of the residue * * of my * * estate as they, in their judgment, may deem best, and to make due inquiry into the financial and social standing of my relations in Ireland, and, after an investigation and a proper knowledge is obtained, to make such grants and disposition of a portion of my estate and property as they, in their judgment, consider best, to such relations.

"10. I also give my said executors power and desire them to dispose of any balance of my estate * * to the best of their judgment, where they may consider it will do the most good and deserving.

"12. I also give my executors power to hold property in trust for any of my friends whom they may think proper."

By clause 1 he appointed certain persons "executors and trustees" of his will:—

Held, that the word "cousins" in clause 7 must be taken to mean first cousins only.

2. That no trust was created in favour of the relations in Ireland; the power given by clauses 9 and 10 was a general power over the residue, without the creation of a trust; it was an absolute power of appointment, which the executors might exercise in favour of themselves or any other person or persons; and the heirs or next of kin could not successfully, as upon an intestacy, make any claim upon the residue, unless in case of default of appointment.

3. That the expressions used in clauses 1 and 12 did not shew that the residue was held by the executors in trust or that there was any trust connected with the power given.

Statement. THIS was an action for the construction of the will of George Towe, deceased. The facts and arguments are fully stated in the judgment.

The case was heard upon motion by the plaintiffs, the executors, for judgment on the pleadings, on the 21st December, 1898.

Aylesworth, Q.C., for the plaintiffs.

E. J. Reynolds, for the defendants the widow and children of Robert Towe.

Ludwig, for the defendant Jane Leeder.

G. C. Biggar, for the defendants William Kerr and Mary Clark.

The following authorities were referred to by counsel:—*Barford v. Street* (1809), 16 Ves. 135; *Lewin on Trusts*

9th ed., p. 676 ; Jarman on Wills, 5th ed., pp. 173, 327 ; *Argument.* *Anderson v. Dougall* (1867), 13 Gr. 164 ; *Anderson v. Kilborn* (1867), *ib.* 219 ; *Fowler v. Garlike* (1830), 1 R. & M. 232 ; *Burrough v. Philcox* (1840), 5 My. & Cr. 73, 93 ; *Brown v. Higgs* (1801), 8 Ves. 561, 570, 574 ; Lewin on Trusts, 8th ed., p. 835 ; *Palmer v. Simmonds* (1854), 2 Dr. 221 ; *Peck v. Halsey* (1726), 2 P. Wms. 387 ; *Jubber v. Jubber* (1839), 9 Sim. 503 ; *Nichols v. Allen* (1881), 130 Mass. 211 ; *Buckle v. Bristow* (1864), 10 Jur. N. S. 1095 ; *Levy v. Levy* (1865), 33 N. Y. 97, 107 ; *Gallego's Exors. v. Attorney-General* (1832), 3 Leigh (Va.) at p. 466 ; *Harris v. Pasquier* (1872), 26 L. T. N. S. 689 ; *Gibbs v. Rumsey* (1813), 2 V. & B. 294 ; *Yeap Cheah Neo v. Ong Cheng Neo* (1875), L. R. 6 P. C. 381 ; *Vezey v. Jamson* (1822), 1 Sim. & Stu. 69 ; Jarman on Wills, 4th ed., pp. 391-5 ; Theobald on Wills, 4th ed., p. 266 ; Hawkins on Wills, 2nd Am. ed., p. 86 ; Williams on Executors, 8th ed., p. 1109.

December 30, 1898. FERGUSON, J.:—

The action is brought by the executors of the last will of George Towe, deceased, who died on or about the 19th day of July, 1897. It is brought to obtain a construction of the will, the plaintiffs asking some specific questions. There does not appear to be any dispute or contention in respect to the facts of the case.

The testator died a bachelor without leaving him surviving father or mother, brother or sister (or any issue of the same), and his next of kin, at the time of his death, were the lawful children, then living, of the brothers and sisters of his father and mother. Of these there were, so far as known: (1) Three children of George Kerr, a deceased brother of the testator's mother. (2) Three children of Abigail Kerr, a daughter of the said George Kerr, who married one Tackaberry, and afterwards died. (3) Three children of Charlotte Kerr, a sister of the testator's mother. (4) Three children of William Kerr, a brother of the testator's mother. (5) Two children of Ellen Kerr,

Judgment. a sister of the testator's mother. (6) Four children of
Ferguson, J. Edward Kerr, a brother of the testator's mother. (7) Four
children of Mary Kerr, a sister of the testator's mother.
(8) One child of Matthew Towe, a brother of the testator's
father. (9) Seven children of Robert Towe, a son of the
said Matthew Towe. The said Robert Towe was living at
the death of the testator, but died afterwards, in 1897,
leaving these seven children and a widow, the defendant
Diana Towe. The defendant Michael James Connolly is
made a party by reason of his being, or claiming to be, the
assignee of some of the shares of the estate.

It will be necessary, as I think, to set forth the contents
of the will, and this is, perhaps, most readily done in *hæc
verba*.

It is as follows :

1. I hereby nominate, appoint, and constitute my friends
William Higginson, of Munster, in the county of Carleton,
yeoman, John George McDonald, yeoman, Robert R.
Phillips, license inspector, Robert Beattie, yeoman, execu-
tors and trustees of this my last will and testament, hereby
revoking and making null and void all last wills and
testaments and writings of a testamentary nature.

2. I will and desire that all my debts, funeral and
testamentary expenses, be paid by my executors as soon as
possible after my decease.

I will and desire that my executors aforesaid shall sell
and dispose of all my real and personal property or estate
not hereinafter devised, willed, or bequeathed ; and

3. I will and desire my said executors to sell or collect
all notes, bills, bonds, and mortgages, due to me in my
own name or due to me as heir-at-law of my late brother
Matthew Towe, now deceased, or due to me as heir-at-law
of my sister Martha Towe, deceased, and, after having paid
all my debts, funeral and testamentary expenses, out of the
proceeds of the said property or estate, to invest the
remainder of the proceeds in the Bank of Montreal, or
some other securities which my said executors may deem
good and reliable, there to be kept on interest until the

said proceeds may be required by my said executors to Judgment.
pay the legacies hereinafter mentioned to be paid in this Ferguson, J.
my last will, or in any codicil or codicils thereto.

4. I give and bequeath, at my decease, to my housekeeper, Margaret Kays, two hundred dollars, one feather bed, five blankets, one coverlet, one bureau with glass knobs, and one cow, if there be a cow on my estate belonging to me at my decease.

5. I give to John George McDonald one hundred dollars in trust, the interest of which I desire to be applied towards the salary of the Presbyterian minister who shall preach in Creentown Church, forever.

6. I give and bequeath to the stewards of the Methodist Church in Creentown one hundred dollars in trust, the interest thereof to be paid yearly to the minister in charge of the circuit, forever.

7. I give and bequeath to each of my cousins the sum of one dollar, payable at my decease.

8. I give and bequeath to Joseph Leeder, son of Jane and Robert Leeder, the sum of one dollar, one year after my decease, the said sum of one dollar to be in full of all claims against me or my estate either in law or equity.

9. I desire that my executors herein named shall have full power to make such and any disposition of the residue and remainder of my property and estate as they, in their judgment, may deem best, and to make due inquiry into the financial and social standing of my relatives in Ireland, and after an investigation and a proper knowledge is obtained, to make such grants and disposition of a portion of my estate and property as they, in their judgment, consider best, to such relations.

10. I also give my said executors power and desire them to dispose of any balance of my estate or property which may be in the bank or in any securities, to the best of their judgment, where they may consider it will do the most good and deserving.

11. I also appoint M. J. Connolly, of Yonge, to do so much of my writing and conveyancing in the winding-up

Judgment. and settling of my estate as he feels competent of performing, and that my executors shall confer with him on all matters appertaining to the final settlement of all matters herein contained.

12. I also give my executors power to hold property in trust for any of my friends whom they may think proper. In witness whereof, etc., etc.

This will was duly proved, and the plaintiffs say that they accepted the burden thereof, and of the trusts therein contained.

The estate was very considerable, between forty thousand and fifty thousand dollars in value.

The plaintiffs, executors, have been advised of the difficulties in respect of the will, and they ask,

1. Generally that the will be construed.

2. Whether or not a trust has been created in favour of the relations of the testator in Ireland, and if so, to what class or classes of such relations they, the executors, are restricted in executing such trust.

3. Whether or not, after payment of the debts and specific legacies mentioned in the will, there is an intestacy as to the residue of the estate, and if so, who are entitled to such residue.

4. In case it is held that there is no intestacy, whether or not the plaintiffs have the right to dispose of the said residue to such person or persons and in such manner as they may think fit.

5. The plaintiffs ask such further directions as may be thought necessary in order that they may properly administer the estate.

I am, after consulting the authorities referred to, of the opinion that the word "cousins," in the seventh paragraph of the will, must be taken to mean first cousins only, that is to say, children of uncles or aunts of the testator. This seems to be the only question or difficulty raised or spoken of in respect of the first eight paragraphs of the will.

As to the ninth paragraph, it is laid down in many places that, to the validity of every disposition, as well of

personal as of real estate, it is requisite that there be a definite subject and a definite object, and that uncertainty in either of these particulars is fatal. Judgment.
Ferguson, J.

The subject first mentioned in the ninth paragraph is sufficiently certain, for it is the "residue." There is, however, not a gift of this residue but only the giving of full power to make disposition of it as to the executors, in their judgment, may seem best. The direction respecting the testator's relations in Ireland is that, after inquiry shall have been made, and after the investigation and proper knowledge obtained, the executors are to make grants and disposition of a portion of the estate and property, as they in their judgment consider best, to such relations. "A portion" of the estate is mentioned, not stating what portion or what proportion, or affording any means of determining what portion or proportion of the estate and property. The subject is, therefore, quite undefined, and this alone would be fatal to the validity of the attempted disposition. But this is not all, for the objects of the attempted disposition are also indefinite. Both the subject and the object of this disposition, or attempted disposition, are left undefined and wholly in the discretion or judgment of the executors. This disposition is, as I think, void.

I am of the opinion that no trust has been created in favour of the testator's relations in Ireland.

The tenth paragraph gives a power over the moneys or funds referred to in it, but leaves the object or objects wholly in the judgment and discretion of the executors, to whom the power is given. The objects are entirely undefined.

No estate or property is directly given to the executors by either the ninth or tenth paragraphs of the will. What they are given is a power, and a power only. There is nothing in either the ninth or tenth paragraphs to indicate a trust. A full power is given, and all else seems to be left at large, undefined, and in the entire discretion of the executors. Powers are either general or limited. General powers are such as the donee of the power can exercise in favour of such person or persons as he pleases.

Judgment. Limited powers are such as the donee of the power can exercise only in favour of certain specified persons or classes. After having consulted a number of authorities and cases, I am clearly of the opinion that the power given by these ninth and tenth paragraphs to the executors is a general power. There is then, as I think, a general power and no trust in respect of the residue of the estate mentioned and referred to in these ninth and tenth paragraphs, and this residue seems to be the whole of the estate remaining after satisfying the requirements of the first eight paragraphs of the will.

The executors are, as I think, given an absolute power of appointment in respect of this residue of the estate. The effect may, I think, be stated in this way. A gift of this residue to such person or persons as the executors may appoint. Being in possession of this absolute, general, and unqualified power of appointment, the executors may appoint in favour of themselves: Farwell on Powers, p. 8, and cases there: or any other person or persons, and the heirs or next of kin cannot successfully make any claim upon or in respect of this residue, unless in case of a default of appointment by the executors.

It follows from what I have said that, in my opinion, there is not an intestacy as to this residue. I may here add that I do not see that the fact that the executors are in the first clause of the will, the one by which they are appointed, called "executors and trustees," nor the fact that they are by the twelfth paragraph empowered to hold property in trust for any of the friends of the testator, as they, the executors, might think proper, or both together, shew, or go to shew, that the residue mentioned in the ninth and tenth paragraphs is held by the executors in trust, or that there is any trust connected with the power given by these paragraphs. I think the foregoing answers all that I am asked in respect of this will.

The costs of all parties will be out of the estate. The executors will have trustees' costs if they so desire.

BABE ET AL. V. THE BOARD OF TRADE OF TORONTO ET AL

Benevolent Society—Gratuity Certificate—Designation of Persons to be Benefited—By-laws—Wife and Children—Executors—Will.

A gratuity certificate, issued by the Board of Trade of Toronto, to a member of the gratuity fund, for the payment, on his death, of a sum of money to his representatives, was made subject to the by-laws of the board, whereby the amount was payable to certain persons or class of persons, and in such proportions as might be designated by the member, in writing and under his signature, a blank being left in the certificate for such designation, but, unless he so designated, the amount was payable, where there was a wife and children, as was the case here, in the proportion of half to the wife and half to the children. No designation was made on the certificate by the member, and his will in no way referred to it :—

Held, that under the terms of the certificate and by-laws the amount went to the widow and children to be divided between them and formed no part of his estate in the hands of his executors.

THIS was an action brought by Thomas Babe and A. G. Ecclestone executors of the estate of George Sharpe, deceased, against the Board of Trade of Toronto and the widow and children of George Sharpe. Statement.

The action was tried before MACMAHON, J., without a jury, at Toronto, on October 5th, 1898.

It was brought by the plaintiffs to recover \$1,500 on a gratuity certificate issued, on the 18th of July, 1896, by the Board of Trade to the deceased as a member of the board; and for a declaration that they were entitled to be paid the \$1,500, and that none of the defendants were entitled to any portion thereof.

The Board of Trade in their defence set out the statutes under which they were incorporated, and also certain by-laws, which are set out in the judgment, under which the gratuity certificate was issued and to which it was made subject, whereby the amount payable thereunder went to the widow and representatives of the deceased, in such proportions as might be designated by the member, and that they had paid to the plaintiffs, as executors, under misapprehension the sum of \$927, setting out the circumstances under which it was paid; and that they had in

Statement. addition the sum of \$468.50 ; and they asked that it should be determined to whom the money was payable under the certificate, and for such relief as might be necessary.

The other defendants, the widow and children of deceased (except two infant children, who through the official guardian submitted their rights to the protection of the Court), set up that the deceased by his will named and designated the widow and children as beneficiaries under the certificate in the manner therein provided.

By agreement admissions were put in and the calling of witnesses dispensed with.

The Board of Trade gratuity certificate was issued on the 18th July, 1896, and certified that "Mr. George Sharpe of Toronto, of Ontario, registered owner of Board of Trade certificate No. 214 has by direction of the trustees of the gratuity fund been admitted to membership in the said fund, subject to the provisions of by-law 17 (see other side)," "and such amendments or additions thereto as may from time to time be made." There was a blank in which it was stated the name of the designated beneficiary or beneficiaries might be filled in, but this was not filled in.

The provisions referred to were fully set out on the other side of the certificate, and are referred to, so far as material, in the judgment.

The testator by his will, after a direction as to payment of his debts and funeral expenses, and the disposal of his business, gave all his estate, both real and personal, unto his wife Mary Ann Sharpe for her life, and after her death to be equally divided amongst his children, share and share alike ; and appointed the plaintiffs his executors.

The additional facts, so far as material, are set out in the judgment.

John MacGregor, and H. M. East, for the plaintiffs.

W. R. Riddell, for the defendants the Board of Trade.

Godfrey, for the adult children of the late George Sharpe.

A. J. Boyd, for the infant defendants.

October 12th, 1898. MACMAHON, J.:—

Judgment.

MacMahon,
J.

The late George Sharpe was a member of the Toronto Board of Trade, and a certificate was issued to him on the 18th July, 1896, by which he became a member of the gratuity fund of the board, subject to the provisions of by-law number 17. He died on the 16th August, 1897, having made and published his last will, dated the 9th August, 1897, appointing the plaintiffs his executors.

The Board of Trade was incorporated by a Dominion Act, 49 Vict. ch. 56, the sixth section of which provides that the said corporation shall have power to create a gratuity fund whereby a gratuity may be provided for the representative of a deceased member, and that they may assess the members of the corporation for such sums as are necessary to create and keep up the gratuity fund.

And by section 7, power is given to the board to pass by-laws from time to time to regulate the assessments, the control and management of the gratuity fund, and the disposition thereof, or payment therefrom to the representatives of deceased members, and for defining the meaning and extent of the term "representatives" therein, and designating the persons and proportions in favour of whom, and in which, such gratuity shall be payable upon the death of any member.

By section 8, the interest of any member in such gratuity fund shall not be liable for his debts or liabilities except only that in case of any such member being indebted to the said corporation in respect of such gratuity fund, they may, if they see fit, apply the gratuity which would be payable to his representatives, or a competent part thereof, in or towards payment of such indebtedness.

By-law number 17, passed by the Board of Trade and referred to in the certificate, provides (clause 10) that "after proof of the death of any subscribing member to the satisfaction of the trustees, there shall be paid out of the moneys collected the sum of \$1,500, which sum shall be paid to the father or mother, brothers or sisters,

Judgment. wife, child or children, grandchild or grandchildren,
MacMahon, step-child or step-children, or other persons to whom the
J. member stands in *loco parentis*, in such proportion as may be designated by the member, which designation shall be by writing over his own signature; and such designation may from time to time be altered as the member may see fit, either as to the persons or class of persons desired to benefit, and which sum shall be payable free from all debts, charges, or demands whatsoever, excepting claims (if any), of the Board, as provided by the Act, 49 Vict. ch. 56, sec. 8 (D)."

By clause 11, "Nothing herein contained shall be taken or construed as a liability of the Board for the payment of any sum whatever, the liability of each member being limited to the payment of the assessments provided for under this by-law on the death of any other member, and the liability of the Board being limited to the payment of the sum above prescribed, or such part thereof as shall be collected, after it shall have been collected from the members, excepting as provided in section 22 of this by-law."

Clause 12: "The disposition or payment of the gratuity upon the death of any member shall be to and in favour of the persons following, and in the proportion following, 'unless the member shall expressly direct otherwise in writing,' in favour of the parties, or some one or more of them, as herein provided by section 10, and the meaning and extent of the term 'representatives' is hereby defined as follows:—

"(c) If the deceased member leave a widow and a child or children surviving, one-half shall be payable to the widow and half to the child or children in equal shares."

Clause 13: "Nothing herein contained shall be construed as constituting any estate *in esse* which can be mortgaged or pledged for the payment of any debts; but it shall be construed as a solemn agreement of every member of the gratuity fund to make a gift to the persons designated by or pursuant to this by-law and of the trustees to collect and pay over to such persons the said gift."

Clause 14: "Nothing herein contained shall give to any person a right of action against the trustees of the gratuity fund, or any officer of the Board of Trade, or other person whomsoever; and any disposition or payment of a gratuity *bonâ fide* made by or under the authority of the said trustees, shall exonerate or discharge the said Board of Trade, and the said trustees and all persons charged with any duty or responsibility in regard thereto, from any further claim, liability or payment in respect thereof, notwithstanding any error which may have occurred in ascertaining or identifying the proper representatives of a deceased member, or the proper person or persons to receive any such payment."

Judgment.
MacMahon,
J.

It is admitted that the deceased George Sharpe did not in the said certificate of membership or in any other manner, except as may be declared by his will to have done, name or designate any beneficiary or beneficiaries to whom the said money should be paid.

By the will of the testator, the following directions were made: "I direct that my just debts and funeral expenses be paid.

"I direct that my coal business be disposed of as soon as conveniently may be, and that my estate be converted into cash, mortgages or other first-class securities as far as possible and as opportunity offers from time to time.

"I give, devise and bequeath all my said estate, both real and personal of every nature and kind whatsoever, unto and to my wife Marianne Sharpe, to and for her natural life only, and upon her decease, after having enjoyed the income thereof, I direct that my said estate be divided among my surviving lawfully begotten children by my said wife share and share alike."

On the 30th August, 1897, Marianne Sharpe, the widow, and Henry M. East, as solicitor for the widow and executors, applied to the Board of Trade for payment out of the gratuity fund of the sum to which the representatives of George Sharpe, deceased, were entitled; and in the application it is stated that the said representatives are the

Judgment.
MacMahon,
J.

following: "Widow, Marianne Sharpe; children Harriet, Bertha Price, wife of C. J. Price; Clara Rachael Sharpe, aged 27 years; Florence Adeline Marshall, aged 25 years; George Sharpe, aged 20 years; and Alfred Sharpe, aged 18 years." George Sharpe has since attained his majority.

On the 5th October, 1897, the defendants the Board of Trade, issued a cheque payable to "the estate of the late George Sharpe, or order," for \$927, being the amount then on hand in the gratuity fund. That cheque was endorsed by the plaintiffs Babe and Ecclestone, as executors of the testator's estate.

It was agreed between the solicitors for the plaintiffs and the defendants that the whole defence should be placed upon the record by way of admissions, so as to dispense with the calling of witnesses. And by the 15th paragraph of the statement of defence, it is admitted that the plaintiffs, instead of paying Marianne Sharpe one-half of the amount, so received and dividing the remainder among the children of the intestate, proceeded to pay therewith certain mortgage and other debts of the testator, George Sharpe. On learning of this appropriation by the executors of the fund, the secretary of the Board of Trade wrote to the executors complaining of the disposition made as being against the by-laws of the association and demanding a return of the fund.

The Board of Trade, ask that it be determined to whom the said money is properly payable, and ask that the costs of their defence may be ordered to be paid out of the money remaining in their hands to be paid.

The Board of Trade has received, in addition to the \$927 already paid to the executors, the sum of \$468.50 which it has in its hands.

By clause 12 of the by-laws, the disposition of the gratuity shall, unless the member expressly direct otherwise in writing, be in favour of his "representatives" as defined by sub-clause (c) thereof, as being the widow, and the child or children surviving the member.

There was no "express direction in writing" by the

testator as to the disposition of this gratuity fund, the will making no reference whatever thereto, the clauses of the will already referred to dealing solely with his general estate. This fund could not be applied to the payment of the testator's debts, and formed no part of his estate, and the executors had no control over it or any right to receive it: *Johnston v. Catholic Mutual Benevolent Association* (1897), 24 A. R. 88.

Judgment.
MacMahon,
J.

The application for the payment out was somewhat misleading, for while it purports to be an application by the representatives of George Sharpe, deceased, and is signed by his widow, and in the body of it his widow is named as well as the children of the deceased, it is also signed by Henry M. East as solicitor for the widow and executors.

It was the intention of the Board of Trade that the fund should be appropriated amongst the "representatives" of the deceased, as provided in the by-law, and in no other way. The fund formed no part of the estate of the deceased to be administered by the executors, but was a fund solely and exclusively for the benefit of and to be divided between the widow and children, as provided by the by-law governing the gratuity fund.

The executors have paid to the widow of George Sharpe the sum of \$150. And I direct that the \$927 less that sum be repaid by the executors to the Board of Trade to be, together with the \$468.50 now on hand, divided by it between the widow and the children in accordance with sub-clause (c) of clause 12 of its by-law, first deducting the costs of the defendants the Board of Trade as between solicitor and client and deducting from the widow's share the said sum of \$150 already paid to her by the executors. The costs of the other defendants to be paid out of the testator's general estate. The share of the infant defendant to be paid into Court to the credit of this cause.

G. F. H.

TEW V. THE TORONTO SAVINGS AND LOAN COMPANY.

Landlord and Tenant—Assignment for the Benefit of Creditors—Future Rent—Preferential Lien—Acceleration Clause—R. S. O. ch. 170, sec. 34.

A lease, under which the rent was payable quarterly in advance, contained a provision that if the lessee should make an assignment for the benefit of creditors, the then current and next ensuing quarter's rent and the current year's taxes should immediately become due and payable as rent in arrear, and recoverable as such:—

Held, on the lessee making such an assignment, that the lessor was entitled to recover by distress and had a preferential lien for—in addition to a quarter's rent due and in arrear for the quarter preceding the making of the assignment—the rent of the current quarter in which the assignment was made, which was also due and in arrear as well as a further quarter's rent, together with the taxes for the current year.

Langley v. Meir (1898), 25 A. R. 372, commented on; *Lazier v. Henderson* (1898), 29 O. R. 673, followed.

Statement. THIS was an action tried before FERGUSON, J., without a jury, at Toronto, on September 28th, 1898.

C. D. Scott, for the plaintiff.

D. W. Dumble, for the defendants.

This action was brought by the assignee for the benefit of the creditors of one Kutzbach, to recover certain moneys claimed by the landlords of the debtor as rent, and paid by the assignee under protest, the assignee claiming that the amount so paid was in excess of the amount properly payable as rent under the lease. The facts are fully stated in the judgment.

December 14, 1898. FERGUSON, J.:—

By an indenture of lease bearing date the 23rd day of March, 1897, and drawn in pursuance of the Act respecting short forms of leases, the defendants leased to one Kutzbach certain premises in the town of Peterborough to be used as a fancy goods shop for the term of five years, to be computed from the 1st day of September, 1897, at a yearly rent of \$700, and taxes to be paid in even portions

quarterly in advance on the 1st days of October, January, Judgment.
April and July, in each and every year during the con- Ferguson, J.
tinuance of the term, the first payment to be made on the
1st day of October, 1897.

By the lease it was declared and agreed amongst other things that if the lessee should make an assignment for the benefit of creditors, the then current and next ensuing quarter's rent and the taxes, rates and assessments for the then current year (to be reckoned upon the rate of the previous year, in case the rate for the then current year should not have been fixed), should immediately become due and payable as rent in arrear, and that in such case such rents, taxes, rates and assessments, might be collected and recovered by the lessors by distress or otherwise in the same manner as rent reserved and in arrear; and that the term granted by the lease should, at the option of the lessor, forthwith become forfeited and void. On the 24th day of January, 1898, Kutzbach, the tenant, made an assignment for the benefit of creditors to the plaintiff as assignee, and a question arose as to the extent of the rights of the lessors in respect of their preferential lien.

The defendants, the lessors, claimed that at the date of the assignment there was due for arrears of rent under the provisions of the lease the sum of \$350, being the sum of \$175 due on the 1st of October, 1897, and the sum of \$175 due on the 1st of January, 1898, and in addition thereto that there became due, by virtue of the provisions of the lease and by reason of the assignment for the benefit of creditors by Kutzbach to the plaintiff, a further sum of \$175 being one quarter's rent, and the further sum of \$119 for the taxes for the year 1898, and claimed to be preferred creditors upon the estate of Kutzbach in respect of those sums, making in all \$644.

The plaintiff admitted the right of the defendants to payment in full out of the assets of the estate to the extent of the sum of \$350, due for rent as aforesaid up to the date of the assignment, and admitted the right of the plaintiff to rank upon the estate with the other creditors

Judgment. for the balance of their claim, but disputed the right of the defendants to payment of such balance of their claim in full out of the assets of the estate in priority to the other general and unsecured creditors of the estate.

On or about the 5th day of April, 1898, the defendants distrained upon the goods and chattels upon the leasehold premises for the sum of \$669.32, being the said sum of \$644 and the sum of \$25.32 for the costs of the distress; and the plaintiff, on the 8th day of April, 1898, paid the defendants this \$669.32, under protest and to release his goods and chattels from the seizure, expressly reserving his right to take action against the defendants to recover the same or any part thereof.

The plaintiff now brings this action and seeks to recover from the defendants \$319.32 and interest from the 8th day of April, 1898, pleading and relying upon the provisions of the statute R. S. O. 1897 ch. 170, sec. 34.

After considering the matter as well as I have been able, I have arrived at the opinion that the expression in what may be called the accelerating clause in the lease, "the then current and next ensuing quarter's rent," embraced and included the quarter's rent that fell due in advance on the 1st day of April, 1898; and that if nothing were said of and no reliance placed upon the provisions of the statute pleaded by the plaintiff, there would upon the execution of the assignment have been three quarters' rent due, for all of which the plaintiff might distrain. It was not disputed that the \$119 claimed as taxes for the current year was a sum ascertained in the manner provided for in the clause in the lease, and the clause declares that such taxes might be collected and recovered by distress or otherwise in the same manner as rents reserved and in arrear.

The three quarters' rent and this sum for taxes, together make the sum of \$644, which is the sum for which the distress was made, and (speaking still apart from the provisions of the statute referred to) I am of the opinion that the defendants had the legal right to distrain for this sum, and nothing seems to be said about the regularity of

the distress. The right of distress seems from the cases Judgment. to be the foundation of what is called the landlord's preferential lien, and the question seems to be, what, in the circumstances, is the effect of the restrictive provision of the Act referred to in regard to the rights of these defendants (landlords), if it has practically any effect in the present case ? Ferguson, J.

In the case *Langley v. Meir*, in the Court of Appeal, not yet reported, (a), the learned Judges do not seem to have been entirely in accord in their views in regard to the meaning and effect of this statute. In that case all the rent in respect of which a preferential lien was claimed was rent that would have, in fact, been earned by the premises within the period of three months after the date of the event giving rise to the trouble, which is not the fact in the present case, for the quarter's rent, that according to the lease and the accelerating clause therein fell due on the 1st day of April, comprehended and embraced rent to be earned by the premises after the expiration of the three months from the date of the assignment, though payable in advance on the 1st of April. I do not think the question that arises here came fairly up for determination in *Langley v. Meir* in the Court of Appeal, (1898), 34 C. L. J. 467, and since that decision the case *Lazier v. Henderson*, has been decided in the Queen's Bench Division (b), determining, as I think, the question for decision in this case. There the Court held that the preferential lien extended to and embraced the quarter's rent that fell due in advance on the 1st day of December, the assignment having been made on the 13th day of September, and were of the opinion that the conclusion arrived at was not in any way affected by the decision in *Langley v. Meir*.

Assuming then that the opinion I have stated in regard to the meaning of the expression "the then current and next ensuing quarter's rent," is the correct one, it is plain

(a) Since reported (1898) 25 A. R. 372.

(b) Since reported (1898) 29 O. R. 673.

Judgment. (following the decision in *Lazier v. Henderson*) that the
Ferguson, J. defendants' preferential lien extended to and embraced the
quarter's rent which was made payable in advance on the
1st day of April, and I think the \$119 taxes is in the
same position, for it was by the contract in the lease, upon
the assignment being made collectable and recoverable by
distress or otherwise in the same manner as rent reserved
and in arrear.

It follows that the defendants have the right by virtue
of their contract and the preferential lien to be paid, all
the money that they distrained for and were paid by the
plaintiff—no question as to fraud against creditors arising—and I think the plaintiff cannot recover back these
moneys or any part of the same.

The action should, I think, be dismissed with costs.

Action dismissed with costs.

G. F. H.

IN THE MATTER OF AN ARBITRATION BETWEEN THE
CORPORATION OF THE TOWN OF CORNWALL AND THE
CORNWALL WATERWORKS COMPANY.

Arbitration and Award—Payment of Amount of Award into Court—Municipal Corporations—R. S. O. ch. 199, sec. 59—R. S. O. ch. 223, secs. 445, 446—Waterworks Company—Mortgagees—Bondholders—Unauthorized Acts of Mortgagees.

Sections 445 and 446 of the Municipal Act, R. S. O. ch. 223, which authorize the payment by a municipal corporation of money awarded for lands taken, with interest and costs into Court, apply to awards made under the Gas and Waterworks Company's Act, R. S. O. ch. 199, sec. 59, and an order for payment in may be amended so as to cover the proper amount payable, such payment to have effect only from the date of the amended order.

It is no objection to such payment in that a controversy exists between the parties to the arbitration as to their respective rights thereunder; but mortgagees and bondholders of the Waterworks Company who are not parties to the arbitration should not be affected thereby.

The acts of officers of a company, mortgagees in trust for bondholders of the Waterworks Company, under the circumstances of this case, set out in the report, in endeavouring to obtain payment of an amount awarded for the purchase money of the waterworks which acts were beyond the powers conferred by the mortgage, were held not to constitute a waiver of the rights of the mortgagees or an acquiescence in the award.

THIS was an application by the Cornwall Waterworks Statement.
Company and by the Farmers' Loan and Trust Company
and the Canada Life Assurance Company to set aside an
ex parte order made by ROBERTSON, J., on 12th July, 1898,
upon the application of the corporation of the town of
Cornwall, allowing them to pay into Court certain monies
mentioned in the award in this matter.

The circumstances under which the arbitration between the parties took place, and the position taken by the holders of the mortgage bonds upon the property, appear in the report of the application to set the award aside in 29 O. R. 350.

The award was made on 5th June, 1897, and fixed the amount to be paid to the Waterworks Company at \$86,491.73, besides \$2,000 for their costs of the arbitration to be paid to their solicitors. Pending the application of the Waterworks Company to set the award aside, the town cor-

Statement. poration submitted and passed a by-law to raise the amount to be paid under the award, and thereupon raised \$87,032.01, the amount of the award with interest to 13th July, 1897, and paid it into the Ontario Bank at Cornwall to the joint credit of the Cornwall Waterworks Company and the Farmers' Loan and Trust Company, the mortgagees in trust for the bondholders. Upon being notified of this fact, the vice-president of the Farmers' Loan and Trust Company enclosed to the manager of the bank their draft upon the bank for the amount deposited, and requested the Waterworks Company to join in the draft, so that the money might be paid out to the Farmers' Loan and Trust Company. This the Waterworks Company refused to do, and the draft was therefore returned unpaid to the Farmers' Loan and Trust Company by the bank. After the dismissal of the motion to set aside the award, the town corporation obtained possession of the works of the Waterworks Company without a breach of the peace, but without the consent of the company, and the company then brought an action against the town corporation to recover possession of their property, upon the ground that forcible possession had been taken, and to recover also the amount of certain monies due them and for other relief. This action was dismissed by Mr. Justice STREET at the Cornwall Assizes on 10th May, 1898, and the Farmers' Loan and Trust Company being parties to it, and a question being raised as to what should be done with the deposit in the bank, a declaration was made that it remained the property of the town corporation, and should be paid back to them by the bank. (See 29 O. R. 605.)

It was argued in that case that the Waterworks Company were entitled, under sec. 64 of R. S. O. ch. 199, to recover possession because the purchase money had not been paid within six months. It was held as to this that the claim could not be sustained for the reason, if for no other, that the action had been begun within six months from the making of the award.

The Waterworks Company began a new action on

14th June, 1898, against the town corporation to recover possession of their property and works, upon the ground that the purchase money had not been paid. The town corporation, being aware of the issue of the writ in this action, though it had not then been served, applied *ex parte* in Chambers on 12th July, 1898, under sec. 446 of the Municipal Act, R. S. O. ch. 223, for leave to pay the amount of the award, \$86,491.73, with six months' interest, into Court to the credit of this matter. Statement.

On the day this application was made *Aylesworth*, Q.C., who had acted as counsel for the Waterworks Company upon the application to set aside the award, was present in Court, and hearing the application made, rose, though without any instructions from any client, and suggested that it should not be granted, as there were important questions in controversy between the parties which should be disposed of before the leave asked for should be given. The order, however, was made and the amount of the award with six months' interest thereon was paid into Court at once, and the notice prescribed by sub-sec. (2) of sec. 446 of the Municipal Act was published and came to the knowledge of the bondholders and mortgagees, and of the Waterworks Company.

Thereupon, separate applications were made, one by the Farmers' Loan and Trust Company and the Canada Life Assurance Company, holders of the bonds issued by the Waterworks Company; and the other by the Waterworks Company, to set aside the order allowing the payment into Court.

The grounds taken by the mortgagees were that the order should not have been made while the action by the Waterworks Company to recover possession was pending, and that it purported to vest in the town of Cornwall the property of the Waterworks Company, notwithstanding the existence of a mortgage, the holders of which had not been made parties to the arbitration proceedings.

Similar grounds were taken by the Waterworks Company, and they added the contention that the amount paid

Statement. into Court should, at all events, have included interest from the date of the award to the time it was paid in—some \$5,000 or \$6,000—as well as the \$2,000 awarded for costs.

The applications were argued before the Honourable Mr. Justice STREET, in Court on the 12th and 13th of October, 1898.

Bruce, Q.C., for the Farmers' Loan and Trust Company and for the Canada Life Assurance Company.

Aylesworth, Q.C., for the Waterworks Company.

E. D. Armour, Q.C., for the corporation of the town of Cornwall.

December 3, 1898. STREET, J.:—

It was contended by both the applicants upon the present motion that secs. 445 and 446 of the Municipal Act, under which the order in question was made, are not to be treated as being embodied in R. S. O. ch. 199, under which the award here was made. I am of opinion, however, that the language of sec. 445, being wide enough to extend to the present case, and there being no good reason why full effect should not be given to the language, I should hold it to cover awards under R. S. O. ch. 199.

I am further of opinion that the mere existence of a controversy, such as here existed between the parties to the arbitration as to their respective rights under it, affords no reason for holding that it was improper on the part of the town corporation to obtain an order allowing them to pay into Court the amount awarded with the interest required by the statute. It was, perhaps, the only way under the circumstances, in which, apart from the bringing of an action and the payment into Court in the action, they could prevent the running of interest upon the amount of the award against them.

I think, under the circumstances, and in view of the questions in controversy, the bringing of an action would have been the more convenient course, but at the same time I

have no doubt of the right of the town corporation to adopt the course of paying it in under the Municipal Act instead. Judgment.
Street, J.

The mortgagees (under which name I mean to include both the Farmers' Loan and Trust Co. and the holders of the bonds secured by the mortgage), have raised the further objection that inasmuch as they were not made parties to the arbitration proceedings and had no opportunity of being heard at them, those proceedings are not in any manner binding upon them and do not affect them in any manner whatever, other than as having perhaps transferred the equity of redemption from the Waterworks Company to the town corporation. This is the view which I expressed in disposing of the motion to set aside this award (29 O.R. 350), and I have nothing since to induce me to change my views upon the point.

It is contended by the town corporation that something which took place after the award has removed this objection, and amounted to acquiescence by the mortgagees in the award. What happened was this:—on the 29th July, 1897, The Farmers' Loan and Trust Company having been made aware that the town corporation had deposited in the Ontario Bank at Cornwall to the joint credit of the Waterworks Company and the Farmers' Loan and Trust Company, the amount awarded with interest to the date of payment amounting in all to \$87,032.01, wrote to the bank enclosing a draft for the amount signed by themselves and asked the Waterworks Company to call and sign it in order that the money might be remitted to them for distribution amongst the bondholders. This letter does not appear to have been authorized by the bondholders, and it was repudiated by them when they first appeared in Court on 23rd September, 1897. The bank replied to the letter, stating that the Waterworks Company refused to sign the draft, and returned it to the Farmers' Loan Company. Thereupon the solicitors for the Farmers' Loan and Trust Company wrote from New York on August 9th, 1897, to the bank, claiming, on behalf of the company, the fund in their hands. This letter was also, so far as

Judgment. appears, unauthorized by the bondholders, and was
Street, J. repudiated by their counsel. The mortgage has been produced, and under its terms the Farmers' Loan Company appear to have no right to receive any part of the principal until the maturity of the bonds in the year 1906, except upon the written request of the bondholders which has not been given here, so far as appears. When the motion to set the award aside came up before me on 23rd September, 1897, the bondholders, having been notified of the motion, appeared and stated that they had not in any way assented to the arbitration proceedings, and that they refused to be bound by them. Subsequently, an action, brought by the Waterworks Company against the town corporation and the Farmers' Loan Company, was tried before me at Cornwall, and, as part of the judgment, I ordered the repayment to the town corporation of the monies they had deposited in the bank without objection on the part of anyone.

Under these circumstances, I am of opinion that the mortgagees are not to be held to have waived their right to insist that the award was not originally and never has become binding upon them. The town corporation had express power under sec. 452 of the Municipal Act to provide by the by-law initiating the proceedings to determine in one award the claims and rights of all persons interested in the property, and under this clause they might, I think, clearly have brought in the mortgagees. But if this is not a proper construction of the statute, then I should prefer to hold that the statute is defective rather than that it authorizes the dealing with the rights of mortgagees behind their backs and without notice to them. It will be noticed that in the English Lands Clauses Act, 1845, 8 Vict. ch. 18, elaborate provisions are made for the protection and valuation of the interests of mortgagees by secs. 108 to 114, inclusive, and by sec. 124, provision seems to be intended for a case such as the present where an interest has been omitted from the original valuation.

I think the result of what the town corporation have

done here is, that the mortgagees have a right to say, as they do say, that they have nothing whatever to do with the money in Court: that their security is upon the property originally mortgaged to them, and that they will look to that only, notwithstanding all that has taken place between the town corporation and the Waterworks Company. See *Martin v. London Chatham & Dover R. W. Co.* (1886), L. R. 1 Ch. 501.

Judgment.

Street, J.

The town corporation, however, by the affidavits upon which they obtained the order allowing them to pay in, and by the force of the order itself, are plainly asserting a right to compel the mortgagees to look to the money paid in instead of to the property which forms their security. The mortgagees were, therefore, compelled to come in to assert their position, lest they should be held to have acquiesced in the view of the town corporation; and if the order is to stand it must at all events be amended by inserting in it a declaration that nothing contained in it is to be treated as affecting the position of the mortgagees or as transferring their charge upon the property to the monies in Court.

I am further of opinion that, as between the town corporation and the Waterworks Company, the amount paid in falls short by a very considerable sum of what the town corporation should have paid into Court in order to obtain the protection of the statute.

I can see no good reason why the sum awarded for costs should not be paid in as well as that awarded for purchase money: it is all awarded to the Waterworks Company alike and should, in my opinion, have been all paid in.

The purchase money was fixed at.....	\$86,491 73
“ costs of the reference at.....	2,000 00
“ interest to 12th July, 1898.....	5,847 67
“ six months' int. required by statute	2,654 75
<hr/>	
They should have paid in.....	\$96,994 15
They actually paid in.....	89,086 48
<hr/>	
Deficiency	\$ 7,907 67

Judgment.

Street, J.

If the town corporation choose to amend the order and to pay in this sum with interest to the date of paying it in, then I will allow them to do so, but their rights, if any, accruing from the payment in, must be treated as dating from the date of the payment in of the amended order, and a new notice must be given. The order must also be amended as I have above indicated, so as to exclude the mortgagees from being bound by it, and the town corporation must pay the costs of both motions. Unless these terms are accepted within ten days, the order allowing the payment in will be set aside with costs, and the town corporation will be entitled to have the money paid out of Court to them. The payment in under the existing or any amended order will not stand in the way of the Waterworks Company proceeding in their pending action to try the right which they assert to recover possession of the property.

G. F. H

HASLEM V. SCHNARR ET AL.

*Intoxicating Liquors—Liquor License Act—Mandamus—Notice of Action
—Rescission of Grant of License—Discretion.*

An action for a mandamus to compel license inspectors and license commissioners to perform their respective duties, and for damages as subsidiary relief, is not within the terms of R. S. O. ch. 88, "An Act to protect Justices of the Peace and others from Vexatious Actions," and no notice of action is necessary.

In an action to enforce the issue of a license which, by resolution of the commissioners, had been granted to the plaintiff, but which resolution was afterwards rescinded in order to grant the license to a subsequent applicant:—

Held, that the license commissioners appointed under the Liquor License Act have, in the exercise of their functions, a wide discretion; but it must be exercised judicially, and the Court has power to compel them to so exercise it; that the commissioners were not acting judicially, but unfairly and contrary to the spirit and intent of the Act, in rescinding their resolution in order to grant a license to a subsequent applicant; but, as such license had been issued to him and the ordering of the issue of a license to the plaintiff would be ordering the issue of a license in excess of the number limited by law, no relief could be granted, and the action was dismissed, but without costs.

Leeson v. The Board of License Commissioners of the County of Dufferin (1890), 19 O. R. 67, not followed.

THIS was an application by Reuben Haslem for a mandamus to compel N. Schnarr, the license inspector, and F. Hemming, G. A. Kobold and W. Lyons, the license commissioners of the district of Rainy River North, to do all acts necessary to grant or secure to the plaintiff a tavern license for his tavern known as "The Club House." Statement.

The plaintiff had been the holder of a tavern license for three years, and prior to the 1st of April, 1898, made the usual application for a new license under the provisions of the Liquor License Act, R. S. O. ch. 245; and the license commissioners, by resolution on the 29th of April, 1898, duly granted the same, being one of nine such licenses granted for the district. It subsequently appeared that by an amendment of the License Act, sec. 18, R. S. O. ch. 245, only eight licenses could be granted, and on the report of the inspector upon the suitability of the premises of the different applicants, the part of the resolution granting the plaintiff a license was on the 8th June, 1898, rescinded, but he was granted a three months' extension under the

Statement. provisions of the Act. On the 8th of June the license commissioners duly certified to the municipality of Rat Portage that the population had so increased since the taking of the last census that an increased number of licensed taverns was needed for the accommodation of travellers and recommended an application to have a new census taken to ascertain if the population had so increased. The census was taken and shewed such an increase as to justify the granting of two additional licenses; and at a meeting of the license commissioners on the 6th of September, 1898, it was decided to grant one of these to the plaintiff and the other to another applicant. A few days after an application was received from one Louis Hilliard, who already had a license for another hotel, for a reconsideration of his prior application for a license for his hotel called "The Hilliard Opera House," which had been destroyed by fire and was then being rebuilt and was near completion, and the license commissioners decided to grant a license to Hilliard instead of the plaintiff, on the ground of Hilliard's hotel being better and more suitable than the plaintiff's.

The motion, which was turned into a motion for judgment by consent of counsel, was argued in Weekly Court, on November 23rd, 1898, before ARMOUR, C.J.

W. N. Ferguson, for the motion. The plaintiff had complied with all the requirements and was entitled to his license: R. S. O. ch. 245, sec. 12. The word "may" in that section is not merely discretionary when all the requirements are fulfilled, and should be construed "must": *Regina v. The Bishop of Oxford* (1879), 4 Q. B. D. 245 and 525; *Julius v. The Bishop of Oxford* (1880), 5 App. Cas. 214. In any event, the commissioners did exercise their discretion, and having done so and decided to grant the license to the plaintiff, they cannot afterwards recall it: *Kelly v. Wade* (1890), 14 P. R. 13 & 66; *Port Elgin Public School Board v. Eby* (1895), 17 P. R. 58.

N. W. Rowell, contra. The action is against a public officer and cannot be brought without notice, which was not given: R. S. O. ch. 88. No mandamus will be granted: *Leeson v. The Board of License Commissioners of the County of Dufferin* (1890), 19 O. R. 67. Even if a mandamus would be granted, this is not a proper case. The commissioners have the right to reconsider and give the license to the more suitable hotel. They have the widest discretion, and have honestly and fairly exercised it.

Ferguson, in reply.

December 28, 1898. ARMOUR, C.J.:—

I do not think that the Act R. S. O. ch. 88, entitled "An Act to protect Justices of the Peace and others from Vexatious Actions," is applicable to an action such as this for a mandamus to compel the performance, by the defendants, the license inspector and the license commissioners of the district of Rainy River North, of their respective duties as such inspector and license commissioners, and for damages as subsidiary relief to such action for such mandamus, so as to require a notice of such action under the provisions of the said Act; nor do I think that such an action is within the terms of the said Act.

And if it was intended to decide otherwise in *Leeson v. The Board of License Commissioners of the County of Dufferin* (1890), 19 O. R. 67, I cannot agree with that decision: *Folger v. Minton* (1852), 10 U. C. R. 423; *Applegarth v. Graham* (1857), 7 C. P. 171; *Kennedy v. Hall* (1857), 7 C. P. 218; *Lewis v. Teale & McDonald* (1871), 32 U. C. R. 108; *Ontario Industrial Loan & Investment Co. v. Lindsey* (1883), 3 O. R. 66; *Flower v. Local Board of Low Leyton* (1877), 5 Ch. D. 347.

The license commissioners appointed under the Liquor License Act have in the exercise of their functions a wide discretion; but it is a discretion which must be exercised judicially, and this Court has ample power to compel them to exercise their functions in a judicial manner: and

Judgment. I do not think that the defendants, the license commissioners, were acting judicially, but unfairly and contrary to the spirit and intent of the Liquor License Act in rescinding their resolution of the 6th September, 1898, granting the plaintiff a license for the sole reason that they desired to grant it to a subsequent applicant, to whom they had already granted one license.

The fair and proper course for them to have pursued would have been to have allowed the license to be issued to the plaintiff and to have let the subsequent applicant wait till the following May* for his second license.

The difficulty, however, in the way of granting the plaintiff the relief he seeks in this action is that the license has been issued to the subsequent applicant, and to order the issue of a license to the plaintiff now would be ordering the issue of a license in excess of the number limited by law.

This is a difficulty which seems to me to be insurmountable, and I must therefore dismiss the action, but under the circumstances without costs.

G. A. B.

*The time of the year at which licenses are issued and renewed.—REP.

[DIVISIONAL COURT.]

REGINA V. COLEMAN.

Criminal Law—Committal for One Offence—Change of Venue—Trial for Two Offences—Administering Oath—Validity of—Comment by Judge on Prisoner not Testifying—Canada Evidence Act, 1893, sec. 4, sub-sec. 2—Recalling Jury—Withdrawal of Comment—New Trial.

The prisoner was committed for trial in one county upon a charge of perjury alleging an offence committed in that county. The venue was changed to another county, where he was tried and found guilty upon an indictment containing two counts, alleging two offences arising out of the same matter. The facts relating to both of the charges appeared in the depositions taken by the committing magistrate:—

Held, that there was jurisdiction to try for both offences in the county to which the venue had been changed.

On the occasion when the perjury was alleged to have been committed the oath was administered to the prisoner in open court by the clerk of the county court sitting in the general sessions of the peace for and at the verbal request of the clerk of the peace:—

Held, that the witness was properly sworn.

At the trial the prisoner did not testify on his own behalf and the trial judge in his charge to the jury, contrary to the provisions of the Canada Evidence Act, 1893, sec. 4, sub-sec. 2, commented upon that fact, although, when his attention was drawn to it, he recalled the jury and withdrew his comment:—

Held, that the prisoner had a right to have his case submitted to the jury without the comment and, having been deprived of that right, there was a substantial wrong done to him which could not be undone by calling back the jury and withdrawing the comment.

New trial ordered.

TWO CROWN CASES RESERVED, the first of which was Statement.
upon the application of the prisoner's counsel at the trial pursuant to section 743 of the Criminal Code, and the other under leave to appeal granted by a criminal court of appeal pursuant to section 744.

The prisoner had been committed for trial before the general sessions of the peace for the county of Dufferin, on a charge of perjury committed in that county; in that he did falsely swear that, he, the said John Coleman, "was present in the office of * * on * * at the time a certain order * * was signed * * and that one James Small was also present and that he heard the said James Small say * * and that one Robert Twible

Statement. and one James Dick were also present * * . Whereas in truth the said John Coleman was not present * * and did not hear the said James Small say * * and neither the said Robert Twible nor the said James Dick were present * *."

The place of trial had been changed from the county of Dufferin to the county of Peel under an order of the judge of the county court and chairman of the general sessions of the peace for the county of Dufferin.

The prisoner was indicted pursuant to the order of the chairman of the general sessions of the peace for the county of Peel endorsed upon an indictment containing two counts, the first of which is set out above and the second being "that the said John Coleman * * did falsely swear that he was present in the office of, etc. * * and that he left the said office * * and went out to feed his horses and *that he had left his horses with his brother-in-law Daniel McCurdy*, whereas in truth the said John Coleman did not leave his horses with the said Daniel McCurdy on the said date."

The facts relating to the offences set out in both counts appeared in the depositions taken before the committing magistrate.

Objection was taken by the prisoner's counsel that there was no jurisdiction to try the prisoner on the second count as the indictment was beyond the committal which was overruled by the learned chairman and the prisoner was tried and convicted upon both counts.

The oath taken by the said John Coleman, when the perjury was alleged to have been committed, was administered in open court by one John McLaren, the clerk of the county court who acted for and at the verbal request of one W. J. L. McKay, the clerk of the peace.

The two questions reserved by the first case were :

1. Was there jurisdiction to try the accused on both counts of the said indictment?
2. Could the accused be legally convicted of perjury upon an oath so administered and taken.

The second case stated and questions thereto were as Statement. follows: The accused John Coleman was tried before me as chairman of the court of general sessions for the county of Peel and a jury of the said county at the sittings of said court in December, 1897, upon a charge of perjury. The accused did not testify on his own behalf at the trial.

In my charge to the jury referring to a certain witness named Twible who gave evidence for the Crown on the trial of the said case I said, "There is no man has sworn he (Twible) was there (referring to a certain place) and four or five men knew whether he was there or not. Now that just shews you that a man can go into the witness box although he was a perjurer and yet tell the truth. You don't need to believe a word he says because no person else will go into the witness box and pledge their oath that he was there. A number of them knew whether he was there or not. Coleman knew whether he was there or not. Small knew whether he was there or not, and Dick knew whether he was there or not. There is not one of them dare go into the witness box and swear that he (Twible) was not there."

I further said in the same charge referring to the said Twible's presence at the said place, "His (Twible's) is the only evidence given before you that says he (Twible) was not there. The accused (Coleman) is a man who can say whether he (Twible) was there or not."

I further said in the same charge to the jury, "Then there was another person alleged to have been there by the name of Dick. We hear nothing from Mr. Dick so we cannot comment on his evidence. I suppose Mr. Dick has not repented yet; has not confessed. If he was there, there is no reason why he should not come forward and if this man is innocent relieve him, but he does not do so. If he was there he is doing wrong by staying away. If he chooses to absent himself of course his friends will have to bear it. It is unfair to him. Why does not Coleman come forward and tell what he (Coleman) knows?"

Counsel for the prisoner Coleman after the jury had

Statement. retired, addressing me, said: "Your Honour spoke to the jury in reference to Coleman not making a statement himself. I think he has the right under the statute and no comment can be made on the fact." I said, "I will correct that as it is entirely wrong."

The jury were then recalled and addressing them I said: "The counsel said and no doubt it is correct, that in enumerating the list of those who knew who was in the office, I mentioned Coleman's name as being one of those who was there, and could if he chose go into the witness box and make statements. If I did say it in that way I should not have said so for the statute provides that neither counsel or Judge has the right to comment on the fact of defendant not going into the witness box. It is his privilege and he may go in if he so chooses, but I didn't intend to say a word about that fact. When I was addressing you it seems I mentioned his name in connection with the others, and I mention that fact to you now. No person has a right to say anything against him if he chooses not to go into the box."

The jury then retired and they found the prisoner guilty.

The case stated for the consideration of the Court is: (1) Does the said charge and subsequent statement to the jury contain comments by the Judge on the failure of the accused to testify within the meaning of 56 Vict. ch. 31, sec. 4, sub-sec. 2 (D.)? (2) If the answer to 1 is "Yes," should there be a new trial?

The cases were argued on the 6th of September, 1898, before a Divisional Court composed of MEREDITH, C.J., ROSE and MACMAHON, JJ.

E. F. B. Johnston, Q.C., for the prisoner. The comment by the chairman of the sessions on the failure of the prisoner to go into the witness box and testify is fatal: 56 Vic. ch. 31, sec. 4, sub-sec. 2 (D.). It is true the comment was withdrawn but the effect of it is there and

the damage done cannot be cured by the subsequent Argument.
 withdrawal. Even the comment of counsel as to the wife of a prisoner not testifying is a ground for a new trial as was held in Nova Scotia in *The Queen v. Corby* (1898), 34 C. L. J. 94; Tremear's Criminal Cases, vol. 1, 457. What the effect of the comment was is not material, the question is, was what he did warranted by law: *Regina v. Petrie* (1890), 20 O. R., at p. 324. See also *The Queen v. Gibson* (1887), 18 Q. B. D. 537. There are similar statutory provisions in some of the United States and it has been held under them that if the reference has been made in the hearing of the jury the mischief is done and the only way is to enforce the statute rigidly. The damage cannot be cured: *Martin v. Mackonochie* (1878), 3 Q. B. D., at p. 775; *Showalter v. The State* (1882), 84 Ind. 562; *Frank Austin v. The People of the State of Illinois* (1882), 102 Ill. 261; Abbot's Trial Brief, Criminal Causes, 221. On the occasion when the perjury was alleged the administering of the oath by the county court clerk was irregular. The appointment of the clerk of the peace is peculiar and particular. The court of quarter sessions is created by statute and it is provided there must be a clerk of the peace appointed in a certain manner and the same as to his deputy, and both by the English law which is in force here, must be approved by the Crown and take an oath of office: Dickinson's Guide to the Quarter Sessions, 104-107.

John Cartwright, Q.C., Deputy Attorney-General, contra. The Legislature did not intend that such a mere slip even if not subsequently corrected should render all the proceedings abortive when no substantial wrong is done. The prisoner is bound by the acts of his counsel at the trial who did not draw the trial Judge's attention to the slip until the charge was finished and only asked to have it corrected, and it was fully explained and corrected: The Code, sec. 746, sub-sec. (f). The oath was properly administered in open court,—the form may be repeated by any one. It is really administered by the court or the

Argument. presiding judge. Reference was made to *Commonwealth v. Wooster* (1886), 141 Mass. 58; *The State v. Thomas Ward* (1888), 61 Vermont, at p. 180; *Martin v. The State* (1891), 79 Wis., at p. 165; *Clifford v. Thames Ironworks & Ship Building Co.*, [1898] 1 Q. B. 314; *Regina v. Tew* (1855), Dears. C. C. 429.

Johnston, in reply. The Massachusetts, Vermont and Wisconsin laws are different from ours. No acts of counsel could relieve the court in this case: *The Queen v. Gibson* (1887), 18 Q. B. D. 537, *per* Wills, J., at p. 543.

December 23rd, 1898. MEREDITH, C.J.:—

Two cases have been stated by the chairman of the general sessions of the peace for the county of Peel, for the opinion of the Court.

One, upon the application of the prisoner's counsel at the trial, pursuant to sec. 743 of the Criminal Code, 1892, and the other (leave to appeal having been granted) pursuant to section 744.

The offences with which the prisoner was charged were committed, if at all, in the county of Dufferin, and he was committed for trial at the general sessions of the peace for that county for one only of the offences charged in the indictment, which was afterwards preferred against him. The place of trial was, under section 651, changed to the county of Peel by an order of the judge of the county court of the county of Dufferin, made before the general sessions for that county began, which contains no provision for the payment to the accused of any additional expense caused to him by the change made in the place of trial.

The indictment preferred against the prisoner in the county of Peel was preferred by leave of the chairman of the general sessions of that county indorsed upon it, and contained two counts: one for the offence for which the prisoner was committed for trial: and the other for perjury alleged to have been committed on the same occasion upon which that charged in the other count is alleged to have

been committed; but the facts and evidence relating to both charges were disclosed in the depositions taken before the committing justice.

Judgment.

Meredith,
C.J.

The first question reserved is:—

“ Was there jurisdiction to try the accused on both counts of the said indictment ? ”

This question must, in my opinion, be answered in the affirmative.

Even if the omission to provide in the order changing the place of trial for the payment of any additional expense thereby caused to the accused might under some circumstances be fatal to the validity of the order, which I very much doubt, seeing that by section 651 the matter is one left to the discretion of the court or judge making the order, there is nothing in the stated case to shew that it was made to appear to the judge who made the order that any additional expense to the accused would be occasioned by the change made in the place of trial, or that the judge was asked to impose any such condition; and it appears to me to be clear that in these circumstances the order was not open to the objection urged against its validity.

The right to prefer the indictment for the two offences is also, I think, clear. Had the trial taken place in the county of Dufferin, no question could have arisen, because by section 641 it is the right of the prosecutor to prefer a bill of indictment for the charge on which the accused has been committed, or in respect of which the prosecutor has been bound over to prosecute, or for any charge founded upon the facts or evidence disclosed on the depositions taken before the justice: and by sub-sec. 2 of sec. 651, where the place of trial is changed, all proceedings in the case are to be had, or if previously commenced, are to be continued in the district, county or place in which the trial is directed to take place, “ as if the case had arisen or the offence had been committed therein.”

The second question reserved relates to the validity of the oath administered to and taken by the prisoner on the

Judgment. occasion upon which the perjuries assigned in the two
counts are alleged to have been committed.
Meredith,
C.J.

That occasion was the trial of one John Hamilton for forgery, at the general sessions of the peace for the county of Dufferin. The prisoner was called as a witness for the accused in that case, and the usual oath was administered to him by Mr. McLaren, the clerk of the county court of the county of Dufferin, who acted at the request of Mr. McKay, the clerk of the peace, in his place at and during the sittings of the general sessions, which were proceeding concurrently with the sittings of the county court.

It is objected that the prisoner was not duly sworn. Granting that Mr. McLaren did not fill the position of deputy of the clerk of the peace, I am nevertheless of opinion that the oath was properly taken by the prisoner. It was taken in open court in the presence of the presiding Judge, who must be deemed to have assented to what was done by Mr. McLaren in administering the oath. It was, I think, quite immaterial by whom the words stating the nature of the obligation which the witness was taking upon himself were uttered. The effective act was the assent of the witness to it, and that was given, as I have said, in open court and in the presence of the presiding Judge, and was equivalent to the repetition by the witness in the first person of the words uttered by Mr. McLaren in the third person; and I cannot doubt that if a witness in open court, with the assent of the presiding Judge to that form being used, take upon himself the obligation involved in the oath by repeating the words of it without the intervention of the clerk of the peace or of any other person, it has the same effect as if the words of the oath were stated by the clerk of the peace and the witness' assent were given in the usual form.

The answer to the second question must be in the affirmative.

The questions reserved by the other case are more difficult of solution, and I have had some doubt as to the proper answer to be given to them.

The prisoner did not testify on his own behalf, and the presiding judge, no doubt, inadvertently, but nevertheless contrary to the provisions of sub-sec. 2 of sec. 4 of the Canada Evidence Act, 1893, commented on the failure of the prisoner to testify, and he did so in pretty strong terms and unfavourably to the prisoner.

Judgment.
Meredith,
C.J.

Had nothing further occurred, I do not doubt that a new trial must have been granted, but the difficulty in the case arises from what subsequently took place during the trial; for upon the attention of the learned judge being called by counsel for the prisoner to the provisions of the statute to which I have referred, the jury were recalled, and what then took place is best stated in the language of the case:

[The learned Chief Justice then set out that portion of the case relating to the recalling of the jury and the chairman's remarks to them, *ante* p. 96.]

It was argued by Mr. Cartwright that the effect of what was thus done was to remedy the mistake into which the learned Judge had fallen, and that the case fell within the terms of the proviso to sub-sec. (f) of sec. 746 of the Code, which forbids the granting of a new trial although it appears that something not according to law was done at the trial, unless in the opinion of the Court some substantial wrong or miscarriage was thereby occasioned on the trial.

The provisions of sub-sec. 2 of sec. 4 are new to the criminal jurisprudence of this country.

The sub-section follows a provision making the person charged with an offence and the wife or husband of the person charged a competent witness and it reads as follows:

"(2) The failure of the person charged, or of the wife or husband of such person, to testify, shall not be made the subject of comment by the Judge or by counsel for the prosecution in addressing the jury."

If it were necessary for the decision of this case to reach a conclusion as to the meaning and scope of sub-section 2, I should have much difficulty in doing it, but it

Judgment.
Meredith,
C.J.

is, I think, unnecessary to enter upon that inquiry. It is, I think, sufficient that the Legislature for some purpose which in its wisdom justified that being done, has forbidden both the Judge and the counsel for the prosecution in addressing the jury to comment on the failure of the accused to testify. What may and what may not amount to comment within the meaning of the sub-section it is unnecessary to consider, because what was done in this case was admittedly a contravention of its provisions and I do not see how it can be said that the effect of the comment was got rid of by the Judge telling the jury that he had inadvertently commented on the failure of the accused to testify, and that he ought not to have done so, because the law forbade it. The thing which the Legislature has forbidden was done, and it could not, from its very nature, be undone.

The prisoner had the right to have the case submitted to the jury without comment on his failure to testify, either by the Judge or the counsel for the prosecution in addressing the jury, and he has been deprived of that right. The Legislature must have deemed it to be of importance to accused persons that no such comment should be made, and the deprivation of that right must, I apprehend, be held to be a substantial wrong to the accused.

The language of Lord Chief Justice Cockburn, in *Martin v. Mackonochie* (1878), 3 Q. B. D., at p. 775, seems to me to be apposite to this case.

He there says: "In a criminal proceeding the question is not alone whether substantial justice has been done, but whether justice has been done according to law. All proceedings *in poenam* are, it need scarcely be observed, *strictissimi juris*; nor should it be forgotten that the formalities of law, though here and there they may lead to the escape of an offender, are intended on the whole to insure the safe administration of justice and the protection of innocence, and must be observed. A party accused has the right to insist on them as matters of right, of which he cannot be deprived against his will; and the Judge

must see that they are followed. * * If the law is imperfect, it is for the Legislature to amend it. The Judge must administer it as he finds it, and the procedure by which an offender is to be tried, though but ancillary to the application of the substantive law and to the ends of justice, is as much part of the law as the substantive law itself."

Judgment.

Meredith,
C.J.

I was at one time inclined to think that no greater effect should be given to the Judge's comment than to a misdirection by him as to the law, and if that were the correct view it would probably follow that having withdrawn the erroneous direction and substituted for it a correct one, it would not be open to the prisoner to complain of what had been done; but on further consideration I have come to the conclusion that the analogy is not complete. Had the statute forbidden the drawing of any inference unfavourable to the accused from his failure to testify, I could understand that the effect of an erroneous direction by the Judge that such an inference might be drawn might be got rid of by the erroneous direction being withdrawn and the proper direction given to the jury. But in regard to what is complained of in this case, the mischief is done when the comment is made, and is in my opinion, as I have already said, from its very nature, incapable of being remedied.

The questions reserved as set out in the second stated case, and each of them, must therefore be answered in the affirmative.

ROSE, J. :—

Case reserved under sec. 743 of the Criminal Code.

This reservation is improper in form.* The reservation should have been to the Court of Appeal, and then in terms it would have been reserved to any Divisional

* The case reserved was "For the consideration of the justices of the Chancery Division of the High Court of Justice."

Judgment.

Rose, J.

Court of the High Court of Justice: see 58 and 59 Vict. ch. 40, sec. 1. I do not further consider this question in view of the opinion I have formed on the case stated under section 744.

The first question reserved is: Was there jurisdiction to try the accused on both counts of the said indictment? Counsel for the prisoner refused to argue that this question should not be answered in the affirmative, abandoning his objection as far as the prisoner was concerned, and I think that the question must be answered in the affirmative.

The second question reserved for the opinion of the Court is: Could the accused be legally convicted of perjury upon an oath so administered and taken? This refers back to the following statement: "The oath taken by the said Coleman at the trial of *The Queen v. Hamilton*, and on which perjury was assigned, was administered in open court by one John McLaren to the accused under the circumstances set out in the evidence of His Honour Judge McCarthy, W. J. L. McKay, clerk of the peace, and John McLaren, clerk of the county court, all of the county of Dufferin, all of which is herewith submitted as part of the reserved case."

Mr. McLaren acted as clerk of the peace at the request of Mr. McKay, and he (McLaren) in the presence of Judge McCarthy, the court being in session, handed the Bible to the witness and repeated the words of the oath, the witness kissing the book and thereupon giving evidence. There was no formal appointment of Mr. McLaren other than as stated.

An oath is stated to be "An outward pledge given by the juror taking it, that his attestation or promise is made under an immediate sense of his responsibility to God": Tyler on Oaths, 15. Again, "An oath is a religious asseveration, by which we either renounce the mercy, or imprecate the vengeance of Heaven, if we speak not the truth. That this is the sense and purport of oaths, appears from those forms of words in which they are commonly expressed, as 'So help me, God,' 'God be my

witness,' 'God be my Avenger,' and other equivalent terms which amount to much the same": Pufendorf, Book 4, ch. 2, sec. 2. It is therefore something which is to bind the conscience of the witness, and is taken by the witness; and I feel no doubt that when the words of the oath are stated to the witness by anyone, in the presence and with the sanction of the court, and the witness takes upon himself the obligation by kissing the book or going through such other form as is permitted by law, the oath is duly administered by the court.

Judgment.

Rose, J.

It was admitted by counsel for the prisoner that if the witness had spoken the words of the oath in the first person, the oath would have been administered. It was hardly denied that if he, after the words were repeated to him, had said "So help me, God," and afterwards had kissed the book, that the oath would have been administered. And I think that he equally took upon himself the obligation of the oath when he kissed the book. This seems to me to be the result of the consideration of the nature of an oath, its object and purpose.

I find the question has arisen in the United States. I refer to *Server v. The State* (1826), in error, in the Supreme Court of Judicature of the State of Indiana. The following is the note that I find in Blackford's Reports, vol. 2, 2nd ed., p. 35: "In an indictment for perjury, the oath said to be false was charged to have been administered in the circuit court by S. C. as deputy clerk. *Held*, that no proof of the appointment of the deputy clerk was necessary; that in administering the oath S. C. acted under the superintendence of the court, and that the oath was as obligatory as if it had been administered by one of the Judges."

In the California Reports, vol. 48, p. 197, is the case of *Julian Oakes v. John Rogers* (1874). In that State the statute provides that "Before making the order, the court or judge shall administer to the applicant the following oath" (giving the form of the oath), p. 200. The court there said: "We think an oath administered by the

Judgment. clerk in open court, under its direction, is an oath administered by the 'court' in the sense of the statute; and upon the facts appearing in this record, we will presume it was so done."

Rose, J.

These cases go to shew that, in the opinion of the courts before which they came, the repeating of the words to the witness in the presence of the court was the act of the court, and nothing is made of the fact by whom the words were spoken. Moreover, I think that, if anything turned upon the words of the oath being administered to the witness by the clerk, any person acting for the regularly appointed clerk, with the concurrence of the court, is *de facto* the clerk of the court.

Judgment on the reserved case must be for the Crown.

In the same matter we have a case stated under sec. 744 of the Criminal Code by the direction of the Court of Appeal. I think it will be convenient to set out in full the case as stated.

[The learned Judge then set out the case reserved.]

On the facts set out in the case, I have no doubt that there were comments made by the Judge on the failure of the accused to testify. The words of the statute are: "(2) The failure of the person charged * * to testify, shall not be made the subject of comment by the Judge or by counsel for the prosecution in addressing the jury." It was hardly contended that what was said by the learned Judge was not a comment upon the fact. Indeed it would seem to me to be idle to argue to the contrary.

The second question was left to us, I think, by inadvertence, because the question as to whether or not there should be a new trial is not one which depends at all upon the question being left to the court in the stated case but upon the provisions of sec. 746 of the Code where the powers of the court are stated.

It is not our duty in this case to direct a new trial notwithstanding "that something not according to law was done at the trial," unless in our opinion "some substan-

tial wrong or miscarriage was thereby occasioned on the trial": sub-section (f). Judgment.

Rose, J.

It is certainly clear that something not according to law was done at the trial; and in my opinion a substantial wrong was occasioned, for the prisoner was entitled to a trial free from comment or observation upon the fact that he did not tender himself as a witness. He had the right to refrain from giving evidence without his failure to testify being made the subject of comment. He had a statutory right. That right he was deprived of, and being deprived of that right by the learned Judge, a wrong was occasioned, and I think a very substantial wrong, and a wrong that in my opinion could not be removed or remedied by the learned Judge calling back the jury and telling them that he had done wrong, as he did do; for in stating what he did to the jury he of necessity repeated the offence of which complaint had been made.

Nor do I think that anything was done by counsel for the prisoner which at all stands in the way of the objection being taken by the prisoner, if indeed on any state of facts such objection by the Crown was tenable. All that the prisoner's counsel did was to call the attention of the court to the prisoner's right under the statute. If the statement by the court to the jury that the statute had been violated took away the right of the prisoner to the benefit of the statute, why of course there is nothing more to be said; but if not, the fact that the attention of the court was called to the error certainly did not deprive the prisoner of his right to move the court for a new trial. Some authorities were referred to by counsel as to the rights of the prisoner to have a trial according to law. *The Queen v. Gibson* (1887), 18 Q. B. D. 537; *Regina v. Petrie* (1890), 20 O. R. 317; *Martin v. Mackonochie* (1878), 3 Q. B. D., at p. 775. The following were also cited: *Frank Austin v. The People of the State of Illinois* (1882), 102 Ill. (S. C.) 261; *Showalter v. The State* (1882), 84 Ind. (S. C.) 562. For these reasons I think that a new trial should be directed.

Judgment. MACMAHON, J. :—

MacMahon,
J.

I agree, and have only a word to add as to that part of the reserved case under the Evidence Act, 56 Vict. ch. 31, (D.), which provides (section 4): "Every person charged with an offence, and the wife or husband, as the case may be, of the person so charged, shall be a competent witness, whether the person so charged is charged solely or jointly with any other person." * *

And by sub-section 2: "The failure of the person charged, or of the wife or husband of such person, to testify, shall not be made the subject of comment by the Judge or by counsel for the prosecution in addressing the jury."

So that the Legislature, while making an accused person a competent witness, intended to prevent any prejudice resulting to him from his failure to testify on his own behalf, by interdicting the Judge and counsel for the Crown from commenting to the jury on such failure. It was because of the certainty which existed in the mind of Parliament that prejudice would result to the accused as a consequence of such comments that there was the positive prohibition against such comments being made.

The learned chairman of the sessions, in commenting on the prisoner not giving evidence on his own behalf, contravened the Act, and therefore prejudiced the fair trial of the prisoner. The making of the comment was a direct violation of the law. How, then, can the Court say there was not "some substantial wrong or miscarriage thereby occasioned at the trial?" although the Judge recalled the jury, and after referring to the error he had made in his charge, said that "no person has a right to say anything against him (the prisoner) if he chooses not to go into the box."

In *The Queen v. Corby* (1898), 30 N.S. Rep. 330, which was before the Court for Crown cases reserved, in Nova Scotia, it appeared that on the trial of the prisoner for theft, the prisoner gave evidence on his own behalf. The prisoner's

wife was not called as a witness on behalf of the defendant. Counsel for the prosecution made the failure of the wife of the accused to testify the subject of comment unfavourable to the prisoner, in his address to the jury. A new trial was granted, and Ritchie, J., at p. 464 of the report, made these pertinent observations: "When once the comment is made the mischief which the law was designed to prevent has been done and nothing can afterwards be said by either counsel or Judge that will be calculated entirely to remove the effect of that comment upon the minds of the jury": Tremear's Criminal Cases, vol. 1, 457.

One would say if the design of sub-sec. 2 of sec. 4 was to prevent the prisoner being prejudiced on his trial, then the Act being violated, a fair trial was not had. If a fair trial was not had, a substantial wrong was done the prisoner.

Judgment.
MacMahon,
J.

G. A. B.

STEWART ET AL. V. SNYDER ET AL.

Executors and Administrators—Liability of—Executors of Surviving Executor—Notice for Claims—R. S. O. (1887) ch. 110, sec. 36 (R. S. O. ch. 129, sec. 38)—Requisites—Administration de bonis non—Statute of Limitations.

A notice by an executor or trustee given under sec. 38, R. S. O. ch. 129, "The Trustee Act," besides calling for claims against the estate, should state that the effect of non-compliance with it will be the exclusion of persons failing to comply therewith from participation in the estate to be divided, and such notice should be published in newspapers in localities where claimants on the estate reside, or in the "Ontario Gazette" if their residence is unknown.

And where the executors of a sole surviving executor of an estate, in giving notice for claims under the statute, omitted to give the proper notice for claims against the estate of which their testator had been to their knowledge executor, with which they had never intermeddled and of the existence of claims against which they were unaware, they were held liable to the *cestuis que trust*, to whose knowledge the existence of the notice was not shewn to have come, for a fund for which their testator was responsible; and the fact that administration *de bonis non* of the estate of which their testator had been executor was subsequently granted to another person did not under the circumstances of this case affect their liability.

The claim of one of the *cestuis que trust* who was entitled to a life interest in, and who had received the income from the wrongful holder of part of the estate in question, was held barred by the statute of limitations as against the executors, she not having received anything from them for six years—liberty to retain the income of the portion to be made good by them being allowed to the executors, they being liable to certain other *cestuis que trust* having a reversionary interest in the fund, and whose claims were protected from the operation of the statute by sub-sec. (b) of sec. 32 of the Act.

In re Somerset, Somerset v. Earl Poulett, [1894] 1 Ch. 231, followed.

Statement.

THIS was an action tried at the Autumn Assizes at Chatham on November the 17th, 1898, before STREET, J., without a jury.

The following facts are taken from the judgment.

The plaintiffs are the children of Moses Clemens, deceased, and Elizabeth Clemens, his wife, who is one of the defendants. The other defendants are John Snyder and Joseph Hagey, executors of Levi Snyder, deceased, and John Clemens, administrator, with the will annexed of the estate of Abraham C. Clemens remaining unadministered. The object of the action is to compel John Snyder and Joseph Hagey to make good part of the estate of Abraham C. Clemens which has been lost.

The facts of the case as I found them at the conclusion of the evidence may shortly be stated as follows :—

Statement.

Abraham C. Clemens died 28th August, 1872, and on 18th September, 1872, probate of his will was granted to Isaac Clemens and Levi Snyder, the executors named in it. By one of the clauses of the will, the testator bequeathed a share of his personal estate, amounting in the event to \$4,600, to his executors upon trust to pay the interest to the defendant Elizabeth Clemens, during her lifetime, and at her decease to pay the principal to the plaintiffs, her children. The executors received this money, and Isaac Clemens, who managed it for both executors, paid the interest to Elizabeth Clemens until he died in 1880. After his death Levi Snyder, the surviving executor, left the management of the estate in the hands of his clerk or agent, one Martin, who was the executor of Isaac Clemens and who continued to pay the interest to Elizabeth Clemens until the year 1890, when Levi Snyder died.

Levi Snyder left a will and appointed the defendants John Snyder and Joseph Hagey, his executors, and they accepted probate of the will, but never intermeddled in any manner with the estate of Abraham C. Clemens, which was in the hands of Martin as the clerk or agent of their testator, Levi Snyder, when he died. They were both aware that Levi Snyder was the sole surviving executor of Abraham C. Clemens, but I do not think I should be justified in finding that either of them had any actual notice or knowledge that any part of his estate was outstanding at the time of the death of Levi Snyder. They inserted in a local paper called the "Preston Progress," published in the village of Preston, near to the residence of Levi Snyder, upon the 4th, 11th, and 18th days of July, 1890, a notice in the words following:

"Notice to creditors.

In the matter of the Estate of the late Levi Snyder.

Notice is hereby given that all parties indebted to the estate of the late Levi Snyder are required to settle their

Statement. indebtedness with the undersigned on or before the 1st day of August next.

Parties having claims against said estate are also required to file same by said date.

Dated Preston,* June 30, 1890.

(Signed) JOSEPH B. HAGEY,
Acting Executor,
Preston, Ontario."

At the expiration of the period mentioned in the notice they proceeded to distribute the estate in accordance with the will. John Snyder, one of the executors named in the will, was one of the beneficiaries and received some \$1,700 as his share of the estate. The wife of the other executor was also a beneficiary and received a like sum, and the executors hold one or two other shares of like amounts under the will for infants.

Elizabeth Clemens and her children, the plaintiffs, have always lived in the county of Kent, at a distance of upwards of one hundred miles from the village of Preston, and this advertisement is not shewn to have come to their knowledge.

The fund in question remained with Martin after the death of Levi Snyder, so far as it continued to have any existence until his death in 1897, and during all that time he continued to pay to Elizabeth Clemens the annual income to which she would have been entitled had the fund remained intact. Upon his death, however, it appeared that only some \$1,600 of it was in existence, the balance having been misappropriated or lost by improper investments.

On the 12th of April, 1897, letters of administration to the estate *de bonis non* of Abraham C. Clemens, with the will annexed, were issued by the Surrogate Court of Waterloo, to the defendant John Clemens, who obtained possession thereunder of the \$1,600 which had remained

* In the county of Waterloo.—REP.

in Martin's hands of the trust fund at the time of his death. This amount he now holds and offers to bring into Court. Statement.

The present action is brought by the children of Elizabeth Clemens to have the balance of the original fund of \$4,600 made good by the defendants John Snyder and Joseph Hagey, as executors of Levi Snyder, deceased, and as the proper representatives of the estate of Abraham C. Clemens, deceased, because they are the executors of his last surviving executor.

The only defences set up by the defendants, the executors of Levi Snyder, which need be stated are those of laches and acquiescence on the part of the plaintiffs and their mother, the statutes of limitation, and the fact that they have fully administered the estate which came to their hands after due notice under sec. 36 of ch. 110 R. S. O. (1887).

M. Houston, and *R. M. Thompson*, for the plaintiffs.

R. L. Gosnell, for John and Elizabeth Clemens.

E. D. Armour, Q.C., and *E. P. Clement*, for John Snyder and Joseph Hagey.

December 3, 1898. STREET, J.:—

I can find no evidence to sustain the defence of laches and acquiescence on the part either of the plaintiffs or of their mother, Elizabeth Clemens. They all lived at a considerable distance from the rest of the parties. The interest was regularly forwarded to Elizabeth Clemens by Mr. Martin, and she was not in any way put upon enquiry as to the capacity in which he was acting. Still less were the plaintiffs chargeable with any laches, for their right to receive the fund has not even yet accrued.

I think I must also hold that the executors of Levi Snyder have not protected themselves against any liability they may be under, to account for or make good the fund in question by reason of the notice they gave.

Judgment.

Street, J.

Executors and trustees are only protected under sec. 38 of ch. 129 R. S. O., when they have given "such or the like notices as in the opinion of the court in which such trustee, etc., is sought to be charged, would have been given by the High Court in an action for the execution of the trusts of such deed, etc., or an administration suit (as the case may be) for creditors and others to send in, etc., their claims, etc."

In my opinion any court in possession of the facts of which these executors were aware, would have so framed the notice as to have included in it a call for claims against the estate of Abraham C. Clemens, and would have published it in the localities where claimants against that estate resided, or else in the Ontario Gazette if their residence were unknown.

I think also, that it is necessary in such a notice to state, as is the invariable custom I think in Court notices, that the effect of a non-compliance with the notice will be to exclude the persons failing to comply with it from a participation in the property to be divided: see form No. 79 under Rule 701. I can not treat this part of the usual court notice as a superfluous and meaningless part of it; it serves to emphasize the demand for claims and to give a reason why it must be complied with, and I cannot hold a notice as being sufficient which entirely omits it.

I do not consider it material to consider whether at the time of his death Levi Snyder held this fund as executor or as a trustee; in either case he was responsible for it to the *cestuis que trust*, and his executors have succeeded to that responsibility and became entitled to the trust fund.

The widow who is entitled to the income of this fund for life, regularly received it from Martin until 1897, when he died, leaving no estate. Martin cannot be treated as having made these payments on behalf of the executors of Levi Snyder, but on his own behalf as holder by wrong of a fund to the income of which she was entitled. Following *In re Somerset, Somerset v. Earl Poulett*, [1894]

1 Ch. 231, I am of opinion that under the circumstances her claims against the executors of Levi Snyder are barred because she has received nothing from them for more than six years, and if she were suing her action must be dismissed, excepting in so far as the fund is in existence in the hands of John Clemens as administrator *de bonis non* of Abraham C. Clemens.

Judgment,
Street, J.

As regards the rights of the plaintiffs, however, who are the children of Elizabeth and Moses Clemens, their right has not yet come into possession and they are protected from the operation of the statute of limitations by subsec. (b) of sec. 32 of ch. 129 R. S. O., which provides that the statute shall not begin to run against any beneficiary unless and until his interest becomes an interest in possession. See as to this also *In re Somerset, Somerset v. Earl Poulett*, above referred to.

I do not see that the appointment of John Clemens in 1897, as the administrator *de bonis non* of Abraham C. Clemens, in any way affects the liability of the defendants, the executors of Levi Snyder. The mere fact of the issue to them of probate as executors of Levi Snyder, the surviving executor of Abraham C. Clemens, constituted them executors of Abraham C. Clemens, so far as his estate remained unadministered. Their rights in that capacity still remain and the subsequent appointment of John Clemens to the same position could not have been made had the facts been brought before the Surrogate Judge who appointed him and would be recalled no doubt should it become desirable to terminate it.

The judgment should direct the payment into Court by him of the fund in his hands being, it is said, all that remains of the original trust fund. The balance which has been lost must be made good by the defendants John Snyder and Joseph B. Hagey. The income of the portion to be made good, which would otherwise go to Elizabeth Clemens, will be retained by them to help them to make good the amount of their loss.

They may desire to have the beneficiaries who have

Judgment. received their shares of the estate of Levi Snyder made
Street, J. parties in the Master's office in order that the amounts, if
any, paid them in error and now required to be refunded
may be ascertained: and I think they are entitled to this
relief, although I express no opinion as to the extent to
which they are entitled to require those beneficiaries to
refund to them. That must be determined in another
action.

The defendants John Snyder and Joseph B. Hagey must
pay the costs of the action.

G. A. B.

STRUTHERS ET AL. V. TOWN OF SUDBURY.

*Assessment and Taxes—Exemptions—R. S. O. ch. 224, sec. 7, sub-sec. 5—
“Public Hospital.”*

The Sudbury General Hospital was the property of private individuals,
and the profits derived from carrying it on belonged to them; it had
not a perpetual foundation; no part of its income was derived from
charity; it was not managed by a public body; but one object of it
was the benefit of a large class of persons; and the Ontario Legislature
had placed it in the list of institutions named in schedule A. to the
Charity Aid Act, R. S. O. 1887 ch. 248, and declared it to be entitled
to aid under the provisions of that Act, subjecting its by-laws to the
control of the Executive Government and the hospital itself to Gov-
ernment inspection:—

Held, that it was entitled to exemption from municipal taxation as being
a “public hospital” within the meaning of sub-sec. 5 of sec. 7 of the
Assessment Act, R. S. O. ch. 224.

Blake v. Mayor, etc., of London (1886-7), 18 Q. B. D. 437, 19 Q. B. D.
79, distinguished.

Statement. ACTION tried before MEREDITH, C.J., without a jury, at
North Bay, on the 7th June, 1898. The facts are stated
in the judgment.

Aylesworth, Q.C., for the plaintiffs.

W. R. White, Q.C., for the defendants.

January 7, 1899. MEREDITH, C.J.:—

Judgment.

Meredith,
C.J.

This action is brought to determine whether or not the Sudbury General Hospital is entitled to exemption from municipal taxation as being a "public hospital" within the meaning of sub-sec. 5 of sec. 7 of the Assessment Act, R. S. O. ch. 224.*

The hospital is the property of the plaintiffs, and the profits which are derived from the carrying of it on belong to them.

In the year 1895, what is called a provisional board of directors was named, consisting of five persons, two of whom are the plaintiffs, and the third the husband of Mrs. McIntyre, who at that time was a co-owner with the plaintiffs of the hospital.

At the same time rules, regulations, and by-laws, which I shall afterwards for convenience refer to as "by-laws," for the control of the officials and employees, were adopted by the provisional board of directors.

The by-laws provide for the election of five directors annually by the persons paying ten dollars annually towards the maintenance of the hospital, who are called "subscribers." They provide also for the appointment by the board, at their first meeting after the annual meeting, of medical officers for the year, and for the admission of patients to the hospital. "All cases of serious injury, all cases of acute non-contagious diseases, are cases eligible for admission." The attending medical officer is made the judge as to "the case" being a proper one for admission. Persons desiring admission and able to pay are required to pay into the funds of the hospital \$4 a week and upward "according to accommodation, care, and treatment de-

* 7. All property in this Province shall be liable to taxation, subject to the following exemptions, that is to say :

* * * * *

(5) Every public school-house, city or town or township hall, court house, gaol, house of correction, lock-up house and public hospital, with the land attached thereto, and the personal property belonging to each of them.

Judgment.
Meredith,
C.J.

manded." A person desiring to occupy a private ward is to pay from \$1 to \$2 per day in advance. Any municipal corporation, company, individual, or number of individuals, may procure the admission of a patient by paying or guaranteeing the payment of these rates. Any worthy indigent person is to be admitted free "upon the certificate of proper persons," if such admission does not overcrowd the hospital, and the person is an actual resident in the district of Nipissing. And any licensed medical practitioner in the town of Sudbury may be a medical attendant of the hospital, if he adheres to its rules.

Such are the provisions of the by-laws as far as it is necessary to refer to them for the purpose of the present inquiry.

No annual meeting has been held and no directors have been elected, and there are and have been no persons entitled to be subscribers according to the provisions of the by-laws.

In the year 1894 application was made by the owners of the hospital, who then carried it on under the name of the Algoma and Nipissing Hospital Company, to the Provincial Government for aid under the Charity Aid Act, R. S. O. 1887 ch. 248, and on the 5th March, 1895, an order in council was passed (subject to ratification by the Legislative Assembly) providing that the Sudbury General Hospital should be taken as named in schedule A. to the Act, and should receive aid in accordance therewith from the 1st January, 1895. The order in council was ratified by the Legislative Assembly on the 21st March, 1895, and the hospital received aid according to its terms and the provisions of the Act for the years 1895 and 1896.

On the 26th February, 1895, the by-laws to which I have referred were approved by order in council of that date.

The Charity Aid Act contains provisions for the making of returns by the "institutions" which receive aid under the Act (sec. 9); for their inspection by the Inspector of Prisons and Public Charities (sec. 12); and the by-laws or

regulations adopted by the directors or managers, or other body or persons having the control or management of the institution, for its government and management, or for prescribing the method and terms of admission thereto, or defining and regulating the duties and powers of the officers and servants thereof, and the salaries, if any, of such officers and servants, are not to have force or effect unless and until approved of by the Lieutenant-Governor in Council, upon the report of the Inspector (sec. 15).

Judgment,
Meredith,
C.J.

I have come to the conclusion, after considerable fluctuation of opinion, and not without some doubt as to the correctness of the opinion I have formed, that the hospital is a public hospital within the meaning of the sub-section under which the exemption is claimed.

The hospital is, no doubt, the private property of the plaintiffs, is managed by them, and carried on for their personal gain. The admission of patients is, moreover, practically under their absolute control, subject only to such control as is, by reason of the hospital being aided under the Charity Aid Act, conferred upon the Provincial authorities by the provisions of that Act to which I have referred.

The Assessment Act contains no definition of the term "public hospital," and it may be said, as was said by Mr. Justice Barrett of the term "public library," used in a similar Act (*The People v. Tax Commissioners* (1877), 11 Hun 506), that the words "public hospital" are not technical; they have acquired by judicial decisions no precise legal meaning; they are words of common use, and are to be interpreted as they are commonly understood.

It is clear, I think, that the words were not used as indicative of a hospital under public, in the sense of governmental or municipal, control, but rather to designate a hospital that is public in the sense of its being open to all—and in the popular sense it would be none the less public because persons seeking admission to it were required to pay for the accommodation which it afforded.

In *Blake v. Mayor, etc., of London* (1886), 18 Q. B. D.

Judgment. 437, referred to by Mr. White, the question was as to the
Meredith, right of the City of London School to exemption as being a
C.J. public school within the meaning of sec. 61, Rule VI., of 5 & 6 Vict. ch. 35, by which allowances in respect of property tax, levied under schedule A. of the Income Tax Acts, are to be made by the commissioners for the duties charged "on any hospital, public school, or almshouse, in respect of the public buildings," etc.

Mr. Justice Denman, in delivering the judgment of the Court in favour of the exemption claimed, said that the words "public school" in the Act were not to be construed as words of art. "The question," he said, "is what is the common understanding of those words, and that is a question not of law but of fact. In many senses the City of London School is a public school according to common understanding; and if some charitable element be necessary in order to satisfy the words creating the exemption, that element exists:" and, referring to the exemption in favour of hospitals, he said: "But a hospital would not be the less entitled to the exemption because certain fees were taken from rich persons who chose to take the benefit of the hospital."

This decision was affirmed in appeal (1887), 19 Q. B. D. 79, and in delivering judgment Lord Justice Fry, while disclaiming the intention of laying down any definition in the sense of saying what would or would not be a public school in all cases, pointed out certain characteristics of the City of London School which denoted a public school. These were that it had a perpetual foundation; that a portion of its income was derived from charity; that it was managed by a public body; that no private person had any interest in the school; that no profit was in the contemplation of the founders or managers; and, lastly, that the object of the school was the benefit of a large class of persons.

Lord Justice Lopes was of opinion that the Legislature did not intend when it used the term "public school" merely a public school maintained solely by charity, and

where education is given gratis. He, too, did not attempt to give an exhaustive definition, but said that he thought the intention was to relieve schools not carried on for profit and in which the public were interested, because a sufficiently large number of the public received education there either gratuitously or to a great extent gratuitously.

Judgment.
Meredith,
C.J.

Lord Esher's opinion was that the object of the school was the education of a sufficiently large number of persons to enable the Court to say that it was a public object, and he thought that the mere fact that a money payment was made by those interested in the persons to be educated did not prevent the school from being a public school within the meaning of the rule.

This case and the language used by some of the Judges from whose judgments I have quoted were relied on by the defendants to support their contention that the plaintiffs' hospital is not entitled to exemption. It is true that all the characteristics mentioned by Lord Justice Fry as denoting a public school, save one—the last mentioned by him—are wanting in the case of the plaintiffs' hospital. It has not a perpetual foundation; no part of its income is derived from charity; it is not managed by a public body; private persons have an interest in it; profit to the owner is in contemplation by the founders and managers; but one object of it is, nevertheless, the benefit of a large class of persons.

The case cited is, however, I think, distinguishable. *Needham v. Bowers* (1888), 21 Q. B. D. 436, shews that it is essential to the claim to exemption under the Act the provisions of which were being considered in both cases, that the hospital, public school, or almshouse, to be entitled to the exemption which the Act affords, be one supported wholly or in part by charity: while the charitable element is not, I think, under the Assessment Act, essential to the claim to exemption in the case of the institutions which are exempted by sub-sec. 5.

That, however, which has finally led me to the conclusion to which I have come in favour of the exemption

Judgment.
Meredith,
C.J.

claimed, is the fact that the Legislature has, by placing the plaintiffs' hospital in the list of institutions named in schedule A. to the Charity Aid Act, and by declaring it to be entitled to aid under the provisions of that Act, as well as by subjecting its by-laws to the control of the executive government, and the hospital itself to inspection by the Inspector of Public Institutions and Charities, manifested its intention to treat the plaintiffs' hospital as, and has stamped it with the character of, a public hospital.

This is, I think, to be taken to be the result of the action of the Legislature, rather than that what has been done should be treated as amounting merely to a grant from the public funds to a purely private undertaking—more especially as the subjection of the hospital to public control, to the extent to which it is subject to such control, is either a necessary condition precedent to the receipt of aid from the public funds, or a necessary result of the receipt of such aid.

I am, therefore, of opinion that the plaintiffs' hospital and the land attached to it and the personal property belonging to it were, in the years 1895 and 1896, exempt from municipal taxation; and, that being so, the plaintiffs are entitled to judgment, with \$5 damages and the costs of the action.

E. B. B.

THOMSON V. CUSHING ET AL.

Equitable Execution—Interest in Land—Writ of Fi. Fa.—Necessity for—Provisions of Will—Effect as to Creditor—Declaratory Judgment.

The testatrix bequeathed to her executors a sum of money in trust to be expended in the purchase of a farm for her nephew, to be conveyed to him subject to the express condition that it should not be sold, mortgaged, or affected in any way, but should be held and enjoyed by him as usufructuary during his life, and at his death should become the property of his children. She also directed that no part of her estate should be liable to seizure or attachment by any creditor of any legatee, "the same being made as and for the alimentary maintenance and support of my several legatees, and I therefore declare the same to be insaisissable."

The executors bought a farm for the nephew and had it conveyed to themselves. Subsequently they executed an instrument in which, after reciting the will and the purchase of the farm, they declared that they stood seized of it upon the trust and for the purposes and subject to the provisions contained in the will.

In an action by a judgment creditor of the nephew to have the latter's interest in the land declared and sold to satisfy the judgment, or for a receiver to receive the rents and profits :—

Held, that the plaintiff could not reach the interest, if any, of his judgment debtor in the lands in question without having a *fi. fa.* lands in the hands of the sheriff of the county in which the lands lay, at the time of the commencement of the action.

Held, also, that if the directions of the will were effectual to prevent the lands being made liable to creditors, the judgment debtor had no interest in the land which could be made available by legal process for satisfaction of the judgment; and if they were not effectual, there was nothing in the way of ordinary process; and in either case the action was not sustainable.

Held, also, that the plaintiff had no *locus standi* to claim a declaration as to the right of the judgment debtor in the lands.

Bunnell v. Gordon (1890), 20 O. R. 281, followed.

AN action by a judgment creditor of the defendant Edward Sawtell to obtain a declaration of the latter's interest in certain lands, and for equitable execution or equitable relief. The facts appear in the judgment. Statement.

The action was tried before MEREDITH, C.J., without a jury, at Toronto, on the 13th September, 1898.

E. D. Armour, Q.C., and *H. J. Martin*, for the plaintiff.

J. H. Macdonald, Q.C., for the defendants Maria Sawtell and Caleb Cushing.

A. W. Briggs, for the defendant Edward Sawtell.

A. J. Boyd, for the infant defendants.

Judgment. January 7, 1899. MEREDITH, C.J.:—

Meredith,
C.J.

The plaintiff is a judgment creditor of the defendant Edward Sawtell, having two unsatisfied judgments against him, recovered in the year 1883.

Dame Harriet Sawtell, who was a resident of the city of Montreal and had her domicile there, on the 11th July, 1889, made her last will and testament in due form, by which, among other devises and bequests, she gave and bequeathed to her executors \$6,000 in trust, to be expended by them in the purchase of a farm for the judgment debtor, but declared that if a farm should be purchased for him by her sister Maria Sawtell, or by the testatrix herself, during their lives, the bequest should become null and void. Following this bequest the will contains a provision in these words:—

“I desire the said farm to be conveyed to the said Edward Sawtell subject to the express condition that it shall not be sold, mortgaged, or affected in any way, but shall be held and enjoyed by the said Edward Sawtell as usufructuary during his life, and at his death it shall become the property of his children, issue of his marriage with his wife Catharine Jacques, in equal proportions, or their children, if any of them should predecease their father, by roots.”

In a subsequent paragraph the testatrix expressly directs as follows: “That no part or portion of my said estate shall be liable to seizure or attachment by or on the part of any creditor or creditors of any legatee, the same being made as and for the alimentary maintenance and support of my several legatees, and I therefore declare the same to be insaisissable.”

By a codicil dated the 8th November, 1889, the testatrix declared that she did not wish her executors to expend the sum of \$6,000 in the purchase of a farm for her nephew Edward Sawtell, or his children, as mentioned in her will, during the lifetime of her sister Maria Sawtell, unless she should specially insist upon it, but that “the said invest-

ment" should be made after her death and should be a first charge on her estate, and that her sister should enjoy the revenues of the \$6,000 during her life.

The executors of the will are the defendants Maria Sawtell (the sister of the testatrix) and Caleb Cushing.

On the 13th February, 1891, James Curry, for the expressed consideration of \$5,300, conveyed to the defendants Maria Sawtell and Caleb Cushing the west half of lot No. 11 in the 1st concession of the township of Amaranth, in the county of Dufferin, in fee simple.

By an instrument dated the 3rd February, 1894, and executed by the defendants Maria Sawtell and Caleb Cushing, after reciting the will, and that these defendants had, under the powers contained in the will, purchased the lands before mentioned, which, with the buildings and improvements, had cost \$6,000, it is declared that these defendants, their heirs, executors, administrators, and assigns, did and should stand seized of the said lands "upon the trust and for the purposes and subject to the provisions mentioned and declared in the said last will and testament of Harriet Sawtell."

The plaintiff's statement of claim sets out these facts, and concludes with a claim in the following words:—

The plaintiff's claim is—

(1) That the interest of the defendant Edward Sawtell in the said land may be declared, and that the same may be ordered to be sold to satisfy the plaintiff's judgments.

(2) Or in the alternative, if this Court should find that the defendant Edward Sawtell is entitled to a life estate only in the said lands, that the plaintiff may be appointed receiver of the rents and profits of the said lands until his said judgments are paid and satisfied, or until the death of the said Edward Sawtell.

(3) Such further and other relief as to this honourable Court may seem meet.

(4) His costs of this action.

The statement of claim contains no allegation that there is in the hands of the sheriff of the county of Dufferin

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Meredith,
C.J.

Judgment.
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C.J.

an execution against the lands of the judgment debtor, nor did it appear in evidence that there was any at the time this action was brought or at any other time.

This is an insuperable difficulty in the way of the plaintiff, because his right to reach the interest, if any, of the judgment debtor in the lands in question depends upon his having an execution against lands in the hands of the proper sheriff in full force at the time of the commencement of this action.

But even if that difficulty were out of the way, the plaintiff would not, in my opinion, be entitled to the relief which he claims.

If the directions contained in the will which were intended to prevent the lands being made liable to the claims of creditors of the beneficiaries are effectual for that purpose, the judgment debtor has no interest in the lands in question which can be made available by legal process for the satisfaction of the plaintiff's judgments; and if they are not effectual to that end, there is nothing in the way of the plaintiff reaching his judgment debtor's interest in the lands by means of ordinary process; and the plaintiff's action is on this ground also not sustainable.

I have not overlooked the claim for a declaration as to the right of the judgment debtor in the lands in question, but, for the reasons already mentioned, the plaintiff has, in my opinion, no *locus standi* to claim any such declaration.

I refer on this point to *Bunnell v. Gordon* (1890), 20 O. R. 281.

The plaintiff's action must therefore be dismissed with costs.

E. B. B.

[DIVISIONAL COURT.]

MAISONNEUVE V. TOWNSHIP OF ROXBOROUGH.

Ditches and Watercourses—Award—Engineer—Jurisdiction—Omissions—Declaration of Ownership—Friendly Meeting—57 Vict. ch. 55, secs. 7, 8—Directory Provisions—Waiver—Validating Clause, sec. 24.

The landowner who initiated the proceedings under the Ditches and Watercourses Act, 57 Vict. ch. 55, upon which the township engineer acted in making an award, had not filed a declaration of ownership pursuant to sec. 7, although he was in fact the owner of the land mentioned in the notice as belonging to him, and had not caused a "friendly meeting" to be held pursuant to sec. 8, before filing his requisition.

The plaintiff, whose lands were affected by the award, contended that the filing of the declaration and the holding of the meeting were acts essential to the jurisdiction of the engineer attaching:—

Held, that the provisions of secs. 7 and 8 should be treated as directory only.

Held, also, following *Moore v. Gamgee* (1890), 25 Q. B. D. 244, that the plaintiff's objections were such as could be waived, and had been waived by her appearing before the engineer and contesting the right of the initiating landowner to have the ditch made on her land and at her expense, without objecting to the engineer's jurisdiction.

Held, also, that sec. 24 of the Act applied so as to validate what was done by the engineer, in spite of the omissions.

AN appeal by the plaintiff from the judgment of Statement. MEREDITH, J., dismissing the action, which was brought for damages and an injunction in respect of an alleged unlawful seizure of the plaintiff's goods. The facts and arguments are stated in the judgment of MEREDITH, C. J.

The appeal was heard by MEREDITH, C. J., ROSE and MACMAHON, JJ., on the 16th February, 1898.

Aylesworth, Q. C., for the plaintiff.

Leitch, Q. C., for the defendants.

In addition to the cases cited in the judgments, *Re Townships of Anderdon and Colchester North* (1891), 21 O. R. 476, *Murray v. Dawson* (1867), 17 C. P. 588, *Owen v. Sprung* (1897), 28 O. R. 607, and *McFarlane v. Miller* (1895), 26 O. R. 516, were referred to.

Judgment. January 7, 1899. MEREDITH, C. J.:—

Meredith,
C.J.

This is an appeal by the plaintiff from the judgment pronounced by Mr. Justice Meredith at Cornwall on the trial of this action by him, without a jury, on the 7th December, 1897, dismissing the action with costs.

An action is brought to recover damages for an alleged unlawful seizure of the plaintiff's goods, and to restrain the sale of them.

The defendants justify their proceedings under the Ditches and Watercourses Act, 57 Vict. ch. 55 (O.), alleging an award under the Act by which the plaintiff's husband was required to dig in and upon the plaintiff's lands, a portion of a ditch which was directed to be constructed; the failure of the plaintiff and her husband to dig the latter's portion of the ditch pursuant to the award; the completion of the work under the provisions of sec. 29; the payment by the defendants in accordance with sec. 30 of the cost of the work, and the fees and charges of the engineer, upon the certificate of that officer; and the placing of the amount so paid on the collector's roll of the year so as to become a charge upon the land, collectable in the same manner as municipal taxes: which matters, as the defendants contend, justified their action in making the seizure complained of.

The learned Judge found that, though the lands of which the plaintiff's husband was throughout the proceedings treated as the owner, stand in the name of the plaintiff, she in fact held them for the husband as well as herself, and that the notice of the proceedings which was given to the husband was a notice to the plaintiff, and that what the husband did in connection with the proceedings was the act of both husband and wife, and bound both of them as far as it could bind either, and that the plaintiff had acted throughout as if her husband was, and allowed him to be treated as, the owner of the lands, and had acquiesced in all that was done by the husband.

We do not differ from these findings, which appear to be

supported by the evidence, but the plaintiff contends that even upon the facts as found she was entitled to succeed.

It appeared at the trial that Hilaire Leroux, the land-owner who filed with the township clerk the requisition upon which the engineer acted in making the appointment, notice of which was given to the plaintiff's husband, had not filed a declaration of ownership pursuant to section 7,* although he was in fact the owner of the land mentioned in the notice as belonging to him, and that he had not caused a "friendly meeting" to be held pursuant to sec. 8† before filing his requisition.

The requisition was, however, communicated to the engineer, who made an appointment, notice of which was served on the plaintiff's husband, and came to the knowledge of the plaintiff; the husband, with the knowledge and consent of the plaintiff, and with the intention and for the purpose of taking part in the proceedings before the engineer, attended at the time and place appointed, and stated their position as to the proposed ditch to the engineer, and procured evidence, and what they desired to be treated as evidence, to shew that they ought not to be called on to dig any part of the ditch: I refer to the certificate of Antoine Sabourin, dated 28th September, 1894: and after the award was made the plaintiff and her husband took some proceeding with a view to an appeal from the award, which was, however, ultimately abandoned, owing, it was said, to its being too late to appeal. It is not without significance that the notice of appeal

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C.J.

*7. Any owner other than the municipality shall, before commencing proceedings under this Act, file with the clerk of the municipality in which the parcel of land requiring the ditch is situate, a declaration of ownership thereof (Form B.) * * .

†8. The owner * * shall, before filing with the clerk of the municipality the requisition provided for by section 13 of this Act, serve upon the owners or occupants of the other lands to be affected a notice in writing (Form C.) signed by him and naming therein a day and hour and also a place convenient to the site of the ditch at which all the owners are to meet and estimate the cost of the ditch, and agree, if possible, upon the apportionment of the work and supply of material * * .

Judgment. which was drawn up appears to be signed by the husband
Meredith, and the wife.
C.J.

The point taken by the plaintiff's counsel is that the filing of the declaration of ownership, and the holding of the "friendly meeting," are acts essential to the jurisdiction of the engineer attaching, and that, as neither of these acts was done, there was no jurisdiction to make the award, which was therefore void, as well as all that had been done in pursuance of it.

The question is a very important one, and there is, as far as I am aware, no decided case in which the point now presented for consideration has been dealt with.

It has, however, been determined that the assent of a majority of the owners, where such assent was required before the requisition could be filed, as was the case under R. S. O. 1887 ch. 220, sec. 6, is essential to the validity of the proceedings and to the jurisdiction of the engineer attaching: *York v. Township of Osgoode* (1894), 21 A. R. 168; 24 S. C. R. 282: and it has also been decided that where the declaration of ownership is filed by one who is not an owner within the meaning of the Act, proceedings initiated by him cannot be impeached on that ground in an action by a contractor against the municipality to recover for the cost of the work under sec. 30, where the objection has not been raised until after the time for appealing from the award has elapsed: *Township of Logan v. Township of McKillop* (1898), 25 A. R. 498.

If the argument of the plaintiff is well founded, and is carried to its logical conclusion, I do not see why the person initiating the proceedings, if he has omitted to file the declaration of ownership, and to convene the "friendly meeting," may not rely upon these omissions to get rid of an award with which he is dissatisfied, nor why, though every landowner interested, having full knowledge of the omissions, had attended the engineer's meeting, and submitted his contention to him, and had permitted the engineer to make his award, without making any objection on account of these omissions, any one of them might not

render the whole of the proceedings nugatory by raising the objection, when an attempt was made to enforce the award, that the engineer had no jurisdiction to make it.

I cannot believe that in either of the suggested cases such an objection would be tenable.

The purpose of requiring the declaration of ownership to be filed was, doubtless, to prevent proceedings being begun by persons who were not owners, and, therefore, not entitled to put in motion the provisions of the Act, and probably also to furnish evidence of ownership behind which the council, when applied to for payment under secs. 27 and 30, should not be required to go.

When such a provision is found in an Act dealing with proceedings which in most cases are taken without the aid of a solicitor and in the rural districts, and recourse to which will probably be of frequent occurrence in almost every part of the Province, it seems to me that it ought to be treated as directory only; the essence of the thing is, to my mind, the fact of ownership; the filing of the declaration of ownership merely the form in which that fact is to be evidenced for the purpose of the proceedings; this manner of viewing the proceedings finds support, I think, from the anxious care which is manifested throughout the Act to prevent what is done under it being defeated by defects in matter of form and even in matter of substance: secs. 10, 23, 24.

Similar considerations apply to the provisions for the holding of the friendly meeting; its purpose, no doubt, was to provide means for the persons interested coming together and agreeing upon what was to be done, and in that way to avoid the necessity of the engineer being called in, and the expense consequent on his services being required; besides this, no means are provided for preserving evidence of the holding of the friendly meeting, and the fact of no agreement having been come to at it, and yet, if the plaintiff's contention is well founded, a municipality applied to for payment under sec. 27 or sec. 30, must either refuse to pay and run the risk that every

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C.J.

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Meredith,
C.J.

thing requisite has been done, or pay and take the risk of failure in the proof and consequent loss of the money paid, and possibly also the risk of paying damages for a wrongful seizure of the property of the person who, if the award were a valid one, would be liable to repay to the municipality what it might pay on his account.

Why may not such objections as these which the plaintiff raises be waived? In *Moore v. Gamgee* (1890), 25 Q. B. D. 244, the action was brought in the County Court of Surrey for a cause which was cognizable by the County Court, but the plaintiff had no right to sue in the County Court of Surrey, unless by leave of the Judge or Registrar. The action was brought without this leave; the defendant appeared at the trial by a solicitor, and the case was partly tried without any objection to the jurisdiction being taken; when it came on again, an adjournment having taken place to enable the Judge to decide a preliminary question raised, the objection was taken, but the Judge held that the defendant by appearing and contesting the action had waived the objection, and his ruling was affirmed on appeal. This case and the reasoning of the learned Judge who delivered the judgment of the Court seem to me to be applicable to the case in hand. The engineer, as it appears to me, had at least what is called by Mr. Justice Erle in *In re Jones v. James* (1850), 19 L. J. Q. B. 257 (referred to in *Moore v. Gamgee*, at p. 247), a contingent jurisdiction; that is, contingent on the filing of the declaration of ownership and the holding of the friendly meeting, and the plaintiff, not having objected at the proper time, that is, when before the engineer, pursuant to his appointment, but having appeared and contested Leroux's right to have the ditch made on her land and at her expense, cannot now raise any objection to the jurisdiction of the engineer founded on the omissions I have mentioned. Paraphrasing the language of Mr. Justice Erle, it may be said: "The engineer would clearly have had jurisdiction if the declaration of ownership had been filed, and the friendly meeting had been held. It is unnecessary to con-

sider what the effect would have been if the plaintiff had appeared and objected to the proceedings because of the omission to do what the Act directs to be done, for according to law the engineer would have jurisdiction to make an award if the plaintiff proceeded in the matter without making the objection."

Judgment.

Meredith,
C.J.

Nor do I see why sec. 24* is not to be read as applying to the objections raised in this case; the words of it are wide enough to embrace these and the like objections, and the Legislature may well have thought that if no step were taken to appeal from the award within the time limited for that purpose, or if an appeal from the award were unsuccessful, and nothing were done to stop the proceedings on account of their illegality, no injustice would be done by fixing upon the parties affected by the award the liability which it assumed to cast upon them, especially as the Act imposes upon the municipality the duty practically of doing whatever any party to the proceeding is required to do, if he fails to do it, giving to the municipality the right to recover from the party in default what it has been called on to pay on his account.

It is not, however, necessary to carry the effect of this provision as far as that, and the decided cases forbid its being held to exclude an objection based on the disregard of or non-compliance with such provisions as those of sec. 5, as amended, but I am prepared to hold that, save as to such an objection, and possibly as to an objection based upon the person initiating the proceedings not being the owner of the land in respect of which the proceedings are begun, and not having filed a declaration of his ownership, every defect in the proceedings taken, and every omission to take a proceeding which the Act directs to be taken,

*24. Every award made under the provisions of this Act shall after the lapse of the time hereinbefore limited for appeal to the Judge, and after the determination of appeals, if any, by him, where the award is affirmed, be valid and binding to all intents and purposes notwithstanding any defect in form or substance either in the award or in any of the proceedings relating to the works to be done thereunder taken under the provisions of this Act.

Judgment.
Meredith,
C.J.

whether the defect or omission be one of substance or of form, is within the validating provisions of sec. 24.

It was further objected that the award is invalid because, as was said, the ditch passes through or into more than seven original township lots, within the meaning of sec. 5, and no resolution of the council of the municipality was passed authorizing the extension of it as required by that section, but this objection I find to be without any foundation of fact to support it, for, although more than seven persons are interested, the ditch passes through or into less than seven original township lots, even if the two schemes dealt with by the award are to be treated as but one.

I do not think it necessary to consider whether the Leroux scheme and proceedings may not be treated as engrafted on and being a part of the scheme initiated by Charles Rouillard, which is referred to in and dealt with by the award, and as to which the objection that a declaration of ownership was not filed does not apply, a declaration having been filed in that case, though I think a strong argument might be made in support of that view.

Upon the whole, I am of opinion that the judgment appealed from is right, and ought to be affirmed, and the motion by way of appeal ought to be dismissed with costs.

MACMAHON, J. :—

I agree.

ROSE, J. :—

My learned brothers have arrived at the conclusion that the objections raised are such as can be waived, and that they have in fact been waived. In this particular case the result reached is one which, for convenience and fairness, should be supported. I cannot say that I am free from doubt, but I have no such decided opinion to the contrary of what has been held as would justify me in dissenting.

I therefore agree in the result, and would refer to Broom's Judgment.
 Legal Maxims, 5th ed., p. 135, and cases there cited, and Rose, J.
 to *Regina v. Heffernan* (1887), 13 O. R. at p. 626 *et seq.*,
 and cases there collected.

E. B. B.

ACCOUNTANT OF THE SUPREME COURT OF
 JUDICATURE V. MARCON ET AL.

*Chattel Mortgage—Erroneous Description of Dwelling-house—Falsa
 Demonstratio.*

Goods intended to be included in a chattel mortgage were described therein as those mentioned in the schedule, the property of the mortgagors, situate upon the premises on the north-east corner of certain streets in a township. The schedule contained a list of the goods, which consisted of household furniture, each article being described, and the articles in each room set out under a heading describing the room. The mortgage contained a covenant that if the mortgagors should part with the possession of the goods, the mortgagee was to be entitled to take possession. One of the mortgagors was described as an "esquire :"—

Held, that, having regard to these provisions, it was to be taken that the mortgaged goods were the property of the mortgagors, in their possession, and contained in the building described in the mortgage ; that that building was the dwelling-house of the mortgagors ; and that the goods were the household furniture in use by the mortgagors.

Hovey v. Whiting (1887), 14 S. C. R. at p. 559, referred to.

And, although, when the mortgage was executed, the goods were in the house at the north-west corner, and not the north-east corner, the mortgage was not void ; the erroneous part of the description might be rejected, and the statement that they were contained in the mortgagors' dwelling-house would remain.

AN appeal by the plaintiff, execution creditor, from an Statement.
 order of the Master in Chambers (upon the summary trial
 of an interpleader issue, directed on the application of
 a sheriff) determining that certain goods seized by the
 sheriff were the property of the claimant, as against the
 execution creditor. The goods were claimed under a chat-
 tel mortgage made by the execution debtor, William H.
 Marcon, and his wife, to the claimant. The facts are
 stated in the judgment.

Argument.

The appeal was heard by MEREDITH, C.J., in Chambers, on the 11th November, 1898.

Coatsworth, for the appellant, cited *Grass v. Austin* (1882), 7 A. R. 511; *Donnelly v. Hall* (1885), 7 O. R. 581; *Milligan v. Sutherland* (1896), 27 O. R. 235; *Ryan v. Shields* (1897), 17 C. L. T. Occ. N. 170.

H. T. Beck, for the claimant, referred on the question of *falsa demonstratio* to *Ferguson v. Freeman* (1879), 27 Gr. 211; *Holtby v. Wilkinson* (1881), 28 Gr. 550; *Hickey v. Stover* (1885), 11 O. R. 106; *Wright v. Collings* (1888), 16 O. R. 182; *Hickey v. Hickey* (1891), 20 O. R. 371; *Re Bain and Leslie* (1894), 25 O. R. 136; *Myers v. Ladd* (1861), 26 Ill. 415; *Spaulding v. Mozier* (1870), 57 Ill. 148; and on the question of the sufficiency of the description, to *McCall v. Wolff* (1885), 13 S. C. R. 130; *Hovey v. Whiting* (1887), 14 S. C. R. 515; *Thomson v. Quirk* (1889), 18 S. C. R. 695; *Williams v. Leonard* (1896), 26 S. C. R. 406; *Fraser v. Bank of Toronto* (1860), 19 U. C. R. 391; *Nattrass v. Phair* (1875), 37 U. C. R. 153.

Skeans, for the sheriff.

January 13, 1899. MEREDITH, C.J.:—

The claimant's title is under a chattel mortgage from the execution debtor and his wife to him, dated the 15th November, 1897; and the only question raised is as to the sufficiency of the description of the goods to satisfy the provisions of what is now sec. 32 of the Bills of Sale and Chattel Mortgage Act, R. S. O. ch. 148.*

The goods are described in the body of the mortgage as "all and singular the goods and chattels mentioned and set forth in the schedule indorsed hereon (or hereunto annexed) and marked with the letter A., all of which said goods and chattels now are the property of the said mortgagors, and are situate in and upon the premises known as

*All the instruments mentioned in this Act * * shall contain such sufficient and full description thereof that the same may be thereby readily and easily known and distinguished.

a detached brick house on the north-east corner of Queen street and Birch avenue, in the township of York, in the county of York, in the Province of Ontario."

Judgment.
Meredith,
C.J.

Indorsed on the mortgage is a schedule, marked A., containing a list of the goods. The goods consist of household furniture, and each article is described, the articles in each room being set out under a heading describing the room according to the purpose for which it was used.

The mortgage contains a covenant on the part of the mortgagors that if they do any of certain enumerated acts, one of them being the parting with the possession of the goods, the mortgagee is to be entitled to take possession of them.

The mortgagor William H. Marcon is described as an "esquire."

Having regard to these provisions, it may, I think, be taken that the mortgaged goods are the property of the mortgagors; that they are in their possession, and are contained in the building described in the mortgage; that that building is the dwelling-house of the mortgagors; and that the goods are the household furniture in use by the mortgagors in the dwelling-house.

These inferences may be, I think, as clearly drawn as were the inferences drawn by Mr. Justice Gwynne in *Hovey v. Whiting* (1887), 14 S. C. R. at p. 559, from the facts and circumstances of that case.

It is, however, argued that, inasmuch as the detached brick house in which the goods actually were when the mortgage was executed was situate at the north-west corner of Queen street and Birch avenue, and not at the north-east corner, as stated in the instrument, the mortgage is void. I am not, however, of that opinion. If I am right in drawing the inferences which I have drawn, the erroneous part of the description may clearly be rejected as *falsa demonstratio*, and there would remain the statement that they were contained in the mortgagors' dwelling-house.

It was further urged that, as the articles described in the schedule were in some cases described in general terms,

Judgment.
Meredith,
C.J.

and there were more of these articles than are mentioned in the schedule, the description is insufficient because of the uncertainty as to which of the articles it was intended to assign.

It has, no doubt, been decided that where there is a detailed description of the articles, and there are more of any particular kind than are mentioned, and the instrument affords no means of determining which of the larger quantity are included in the conveyance, the conveyance is invalid under the Act as to all of the articles of that particular kind: *McCall v. Wolff* (1885), 13 S. C. R. 130.

[The learned Chief Justice proceeded to state the evidence upon this point, and disposed of it, upon the evidence, in favour of the claimant.]

Appeal dismissed with costs.

E. B. B.

[DIVISIONAL COURT.]

HAGEN V. CANADIAN PACIFIC R. W. CO.

County Court Appeal—Divisional Court—Judgment of Nonsuit—"Trial with a Jury"—R. S. O. ch. 55, sec. 51, sub-sec. (4).

Where, at the trial of an action in a County or District Court, the Judge, at the conclusion of the plaintiff's evidence, withdraws the case from the jury, and gives judgment dismissing the action, an appeal lies from such judgment to a Divisional Court of the High Court, for there has not been "a trial with a jury," within the meaning of sec. 51, sub-sec. (4), of the County Courts Act, R. S. O. ch. 55.

Statement.

AN appeal by the plaintiff from the judgment of the Judge of the District Court of Algoma dismissing an action brought in that Court to recover damages for injuries sustained owing to the alleged negligence of the defendants. The trial of the action was begun before the Judge and a jury, but at the end of the plaintiff's evidence the Judge withdrew the case from the jury, on the ground of contributory negligence, and dismissed the action.

Upon the appeal coming on for hearing before a Divisional Court (ARMOUR, C.J., FALCONBRIDGE and STREET, JJ.), on the 25th January, 1899, *D'Arcy Scott*, for the defendants, objected that an appeal did not lie to this Court for the purpose of obtaining a new trial, but a motion should have been made to the District Court.

By sec. 51, sub-sec. (1), of the County Courts Act, R. S. O. ch. 55, the provision applicable to appeals from decision of District Courts, it is provided that "any party to a cause or matter in a County Court may appeal to a Divisional Court of the High Court of Justice from any judgment directed by a Judge of the County Court to be entered at or after the trial in any case tried without a jury, and also in any case tried with a jury, to which sub-section (4) does not apply."

"(4) Where there has been a trial with a jury any motion for a new trial, whether made for that relief alone, or combined with or as an alternative for any other relief, shall be made to the County Court."

Scott contended that in this case there had been "a trial with a jury," citing *Etty v. Wilson* (1878), 3 Ex. D. 359.

Watson, Q.C., for the plaintiff, in answer to the objection, referred to *Yetts v. Foster* (1878), 3 C. P. D. 437; *Davies v. Felix* (1878), 4 Ex. D. 32.

THE COURT held that "trial with a jury" does not include the case of a Judge nonsuiting the plaintiff or withdrawing the case from the jury altogether, and so here there had not been a trial with a jury, and therefore the appeal was properly brought.

Objection overruled.

E. B. B.

[DIVISIONAL COURT.]

RE SOULES.

Will—Survivorship—Youngest Surviving Child Attaining Majority—Period of Distribution—Vesting of Shares.

A testator by his will gave his residuary estate to his executors upon trust to make provision for the support and maintenance of his family and for their education until his youngest surviving child should attain twenty-one years of age, when it was to be divided by the executors, by their setting apart one-third thereof for his widow, during her widowhood or until she remarried, and the remaining two-thirds to his surviving children in the proportion of four parts to the sons and three parts to the daughters; and after the death or marriage of his widow, the said one-third was to be divided between his surviving children in the above proportions. The widow survived the testator, but died before the youngest surviving child attained the age of twenty-one years:—

Held, that the words of survivorship referred to the period of distribution, namely, when the youngest surviving child attained twenty-one years of age, and, therefore, only the children then living were entitled to share in the residue, and this applied as well to the shares to be taken by the children as to the share to be set apart for the widow.

Statement. THIS was an originating notice under Consolidated Rule 938 given by John H. Henderson, sole surviving executor under the last will and testament of George Soules, deceased, for a declaration by the Court of the persons entitled to share in the distribution of the residue of the testator's estate under trusts declared by the will.

The testator's children, in the order of age, were Albert Chesley Soules, Ada Selina Wylie, Elizabeth Susannah Brown, George Fulton Soules, Minnie Louisa Soules, Phoebe Anna Soules, Herbert Norman Soules, and Percy Everrit Soules. Of these, Albert Chesley died, leaving a widow and one infant; Ada Selina died, leaving her husband and five infant children her surviving; Minnie Louisa, and Percy Everrit, who died under age unmarried. All these deaths occurred before the youngest surviving child attained majority.

A. G. F. Lawrence, for the executor.

G. G. S. Lindsey, for Walter F. Wylie, husband of Ada Selina Wylie, and Hannah Soules, widow of Albert Chesley Soules.

L. F. Heyd, for other adult claimants.

Statement.

A. J. Boyd, for the official guardian, appeared for the infant children.

October 17th, 1898. MEREDITH, C.J. :—

The testator died on the 20th July, 1880, having on the previous day made his will.

By it he gave the residue of his estate, after making some provisions not necessary to be referred to, to his executors "upon trust to make provision for the support and maintenance of my family, as also their education, until the youngest surviving child shall attain the age of twenty-one years, at which time it is my will that the residue of my estate shall be divided in manner following, that is to say, one-third shall be set apart and invested for the sole use and benefit of my wife, so long as she shall remain my widow and not marry again; the remaining two-thirds shall be divided between my surviving children, each son and daughter receiving his and her portion in the proportion of four parts to a son and three parts to a daughter. After the decease of my widow, or in the event of her contracting marriage again, the above-mentioned one-third of my estate shall be divided between my surviving children, each son and daughter receiving his or her portion in the proportion of four parts to a son and three parts to a daughter as aforesaid."

Then immediately after this declaration of the trusts of the residue, comes the following paragraph :—

"I do hereby empower my executors to sell and dispose of all my personal and real estate under this trust for the benefit of my family as above set forth * * ."

And in a later paragraph the names of the testator's children are given in the order of their seniority.

The widow survived the testator and died on the 7th March, 1895, without having married again. Percy Everett, the youngest of the children, died shortly after the death of his father, being then an infant; and Herbert Norman,

Judgment. who was the next youngest, attained his majority on the 28th March, 1898.

Meredith,
C.J.

One of the children, Minnie Louisa, died on the 16th October, 1890, before attaining her majority.

Two of them, Albert Chesley, and Ada Selina, attained twenty-one and died on the 11th August, 1897, and 9th November, 1897, respectively.

Upon this state of facts the executors seek the aid of the Court for the purpose of ascertaining who are the persons entitled to share in the distribution of the residue of the testator's estate, under the trusts declared as to it by the will.

After much consideration, I have reluctantly come to the conclusion that I am bound by authority to hold that only those of the children who were living when Herbert Norman attained his majority, including Herbert Norman, are entitled to share, I say reluctantly, because the construction I feel compelled to place on the language of the testator produces a result which, I am convinced, he never contemplated or intended.

The testator, at the date of his will, which was apparently made when he was upon his deathbed, eight children living, the eldest being then less than fifteen years of age, and the youngest an infant of about six months. He appears not to have contemplated the possibility of his wife dying before his youngest child would attain twenty-one; and the scheme for the disposition of his property which he appears to have had in his mind was, or perhaps I should say, but for the decided cases, I should have thought was to give the whole of his property to his children, but to postpone until his youngest child attained twenty-one any division of the corpus, in order that during that period the maintenance and education of his family might be provided for, the time of the youngest child attaining his majority being that at which, in his judgment, it was proper that the division of the corpus should be made; but at that time, as he thought, his wife would be living and it was necessary to provide for her maintenance,

and therefore to postpone the division of one-third of the corpus until her death, or until she should marry again when that one-third also was to be divided.

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Meredith,
C. J.

I can understand, had the testator said that the division of his estate which he provides for should be between his "children or the survivors or survivor of them," or between his "children with benefit of survivorship," the force of the argument that the words of survivorship should be taken to refer to the period of division; but where the language is, as in this will it is, "my surviving children," I do not see why these words may not well be read as the equivalent of "my children who survive me." If one devise to the surviving children of A. (a living person), I should have thought that, whether the devise is to take effect in possession at the death of the testator or at the death of A., that what is meant is that the children of A. who survive him should take. It has, however, been determined, *Neathway v. Reed* (1853), 3 DeG. M. & G. 18, that an immediate gift to the surviving children of A. is a gift to those of the children who survive the testator, because there is in such a case no other period than the death of the testator to which the period of survivorship can be referred; but that if the gift be to A. for life and after her death to her surviving children, the period of survivorship is the death of A.

The testator, it will be observed, uses the word "surviving" thrée times; first, in fixing the period during which the whole estate is to remain in the hands of his executors, "until the youngest surviving child shall attain the age of twenty-one years;" next, in describing the class which is to share in the division of the two-thirds, which are at that time to be, as he says, "divided between my surviving children;" and the third time in describing the class which is to share in the division of the remaining one-third when that is to be divided, as he says, "after the decease of my widow or in the event of her contracting marriage again."

Had the event happened which the testator had in

Judgment.

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C.J.

contemplation—that of his wife surviving the time when his youngest child should attain the age of twenty-one years—it would seem, as I understand the cases, that each time the word “surviving” is used it would be necessary to ascribe to it a different meaning. When first used, it must be taken to mean surviving the testator; when next used, surviving the period when the youngest child should attain twenty-one; and the last time, possibly as meaning surviving at the death or second marriage of his widow.

Such a result it is difficult to think was contemplated by the testator, and it manifests the danger which a testator runs in using words the meaning of which, as they must be judicially interpreted, does not correspond with that which ordinary persons would attach to them, a danger to which Vice-Chancellor Wood referred in *In re Gregson's Trusts* (1864), 2 DeG. J. & S. 428, 33 L. J. N. S. Ch. 531.

In no reported case that I have seen has the decision been upon the exact words used in this will, “my surviving children;” in most of them the words used are “or the survivors or survivor of them,” or with “benefit of survivorship,” following the primary description of the class.

In *Wordsworth v. Wood* (1839), 2 Beav. 25; 4 My. & Cr. 641; (1847), 1 H. L. Ca. 129, the words were “my surviving female children,” and these words were held to have reference not to survivorship at the death of the testator, but at the death of his widow, upon whose decease the fund in question was to be divided between the testator's surviving female children.

Lord Brougham, it is true, went the length of holding, as had the Master of the Rolls, that apart from the context the word “surviving” was naturally, and indeed necessarily, referable to the death of the widow; but the other Lords, the (Lord Chancellor and Lord Campbell), who took part in the decision, rested their judgments upon the effect of the whole will, which made it necessary to read the provisions as one for a class included in a larger class

which had been previously described as the then surviving children ("then" clearly applying to the death of the widow), and therefore necessarily composed only of persons included in that class; and Lord Campbell refrains from stating any opinion as to what would have been the construction of the provision for the female surviving children had it been the only one which the will contained. He says, at p. 156: "It seems to me that the doctrine of the case of *Cripps v. Wolcott* (1818), 4 Madd. 11, does not arise here. When the same question does arise at your Lordships' bar, I think it would be for your Lordships to determine whether that case is or is not consistent with the former decisions of this House, upon which I will not now give any opinion. It seems to me that neither *Cripps v. Wolcott*, nor any of the cases that have been cited, throw any light upon this case."

Judgment.
Meredith,
C.J.

The Lord Chancellor was of the same opinion. See the report of his judgment in the case as reported in (1839), 4 My. & Cr. 641, at p. 645.

The argument of Mr. Rolt, one of the counsel for the appellant, was that there was a manifest difference between the words "my surviving children" and the words "the survivors or survivor of my children." He contended that if the former words were read without reference to the context they meant "my children who shall survive me," and he said that *Taylor v. Beverley* (1844), 1 Coll. 108, was the only other case in which the form of expression "my surviving children" was found.

In *Taylor v. Beverley*, the gift was to the testator's daughter Isabella for life, and in case she should leave issue unto and equally between such issue; but if she should die without issue to the testator's surviving children and their legal personal representatives, and it was held that the words "surviving children" meant children surviving the daughter Isabella.

In coming to that conclusion, stress was laid by the Vice-Chancellor upon the fact that Isabella was one of the testator's children living when the will was made and at

Judgment. his death, and he said in delivering judgment that con-
Meredith, sidering that fact, considering the event which was to give
C.J. a title to the persons called the testator's surviving children, and the place in which the expression occurred, he conceived the phrase "my surviving children," as used in the will, meant "my children then living," or (that which is the same, "my children surviving Isabella Howson"), and further on he treats the testator's words as being used as "a term of distinction between Isabella Howson, and others, his children—that distinction, being her death and their continuance in life."

Taylor v. Beverley, therefore, seems to me quite distinguishable from the present case. There the event, on the happening of which the class was to take, was the death, without issue, of Isabella, who, if the words were referable to the death of the testator, was herself a member of the class which was to take if that event happened, and as a member of the class one of the beneficiaries designated by it which it is difficult to conceive to have been the intention of the testator; and it is to this, I think, that the Vice-Chancellor refers, when he speaks of the words being used as a term of distinction between Isabella Howson and others his children.

I am bound to admit, however, that in the cases in which the doctrine of *Cripps v. Wolcott* (extended to real property by *In re Gregson's Trusts* (1864), 2 DeG. J. & S. 428, 33 L. J. N. S. Ch. 531), has been approved and acted upon (and in the recent cases it has been approved and acted upon, unless there was to be found an indication of a contrary intention to be gathered from the whole will), no distinction such as I have endeavoured to point out has been drawn or recognized as existing between the form of expression used in those cases and the words used in the will I am dealing with, and the rule is stated generally in substance as it is put in *Jarman on Wills*, 5th ed., p. 1547, "In this state of the authorities one scarcely need hesitate to affirm, that the rule which reads a gift to survivors, simply as applying to objects living at the death of the testator, is confined to

those cases in which there is no other period to which survivorship can be referred; and that where such a gift is preceded by a life or other prior interest, it takes effect in favour of those who survive the period of distribution and of those only."

It would serve no good purpose to refer to the cases cited in support of Mr. Jarman's statement of the rule. They are to be found in chapter 47, subdivision 3, and the notes to it. And the rule is stated substantially in the same way by the present Chief Justice of Canada, then Vice-Chancellor, in *Murphy v. Murphy* (1873), 20 Gr. 575, at p. 577.

In this state of the authorities it is, I think, my duty to hold that the words of survivorship used by the testator, in declaring the trusts of the corpus of the residue of his estate, have reference to the period of distribution, and therefore that only those of the children who were living when Herbert Norman attained his majority are entitled to share in the division of it; leaving it to an Appellate Court, if the reasons which seem to me to support such a conclusion commend themselves to it as sufficient to warrant that being done, to decide that the language of the testator is not to be interpreted by the rule of construction to which I have referred.

I have only to add upon this point that the cases cited by Mr. Lindsey and Mr. Boyd are distinguishable because of the words of survivorship in them not being given, as they must in this case have, their primary meaning.

One other point only remains to be considered. It was argued that whatever meaning was to be attributed to the words of survivorship in the trust to divide the two-thirds, that meaning is not to be ascribed to them, as used in the trust, as to the remaining one-third, and that the words of survivorship there used have reference to the death or second marriage of the widow, or that, if that be not so, that one-third is, in the events that have happened, undisposed of; but neither contention is, I think, well founded. The provision for the setting apart of the one-third for invest-

Judgment.

Meredith,
C.J.

Judgment.

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C. J.

ment for the benefit of the widow was not intended to and could not, according to the terms of the will, take effect unless the widow survived the period fixed for the division of the two-thirds; and therefore the class, if I am right in the conclusion I have come to on the principal question, must consist only of those who survived both periods, and therefore the first of these propositions is not maintainable. The second also cannot, I think, prevail. The postponement of the division of the one-third was only for the purpose of letting in the provision for the maintenance of the widow, but, as she did not survive the period fixed for the division of the two-thirds, the direction to postpone never took effect; and upon the principle upon which such cases as *Bigelow v. Bigelow* (1872), 19 Gr. 549, was decided, and of the rule of construction stated by Mr. Jarman at p. 762, the ultimate trust as to the one-third is not to be treated as a trust contingent on the one-third having to be and having been set apart, or a creation of a future interest, but only as a provision postponing the possession of the one-third if the event on which a postponement was to take place happened; and in any case, looking at the will as a whole, it is, I think, reasonably clear that the same survivors who should become entitled to take the two-thirds were to be entitled ultimately to take the remaining one-third.

There will be a declaration of the rights of the parties in accordance with the opinion I have expressed, and the costs of all parties must be paid out of the residue, those of the executors to be as between solicitor and client.

From this judgment, Walter F. Wiley, the husband of Ada Selina Wiley, deceased, and the official guardian for the said children, appealed to a Divisional Court composed of BOYD, C., FERGUSON and MEREDITH, JJ.

November 15, 1898. *G. G. S. Lindsey*, for the appellants. The residue of the estate should be divided among those children of the testator who survived him

Argument.

and lived to attain twenty-one, although they may have died before the period of distribution, that is, when the youngest surviving child attained twenty-one. Had the will stopped at the words to be "divided," etc., then there would be a bequest to the children when the youngest attained twenty-one, which, according to the rule in *Leeming v. Sherratt* (1842), 2 Hare 14, vested in all the children who attained twenty-one to the exclusion of those dying under twenty-one; but the further provision that the division should be among "my surviving children," must be read "my children who survive me." In *Gripps v. Wolcott* (1818), 4 Madd. 11, a gift to A. for life, and after his death to his surviving children, "surviving," was construed to mean living at the death of A.; unless there is a previous life estate, the survivors take at the testator's death. Here no life estate is given, the estate is to be distributed by way of maintenance till the period of distribution arrives. There is a distinction between this case and *Crozier v. Fisher* (1828), 4 Russ. 398, where there was a bequest to trustees to apply the interest for the benefit of the children till the youngest attained twenty-one, and then all the children were to be let into possession of the property. There the word survivors was held to mean surviving so as to attain the respective ages of twenty-one. See also *Alty v. Moss* (1876), 34 L. T. N. S. 312; *Knight v. Knight* (1857), 25 Beav. 111; *Bouverie v. Bouverie* (1847), 2 Philips 349; *Tribe v. Newland* (1852), 5 DeG. & S. 236. The only bequest here is in the direction to pay. In *Re Douglas*, *Kinsey v. Douglas* (1892), 22 O. R. 553, it was held that the gift vested prior to the enjoyment of the corpus of the estate, it being only postponed to provide for the maintenance of the family, the gift vesting in each child only on attaining twenty-one years. The case of *Wordsworth v. Ward* (1839), 2 Beav. 25; 4 My. & Cr. 641; (1847), 1 H. L. Cas. 129; and *Taylor v. Beverley* (1844), 1 Coll. 108, are distinguishable. There the words used are "my surviving children." In the case of *Doe d. Long v. Prigg*

Argument. (1828), 8 B. & C. 231, a bequest to "my surviving children" was read to mean, my children surviving me, although there was an intermediate gift.

Lawrence, for the executor, and *L. F. Heyd*, for the adult claimants, relied on the judgment of MEREDITH, C.J., and the cases there referred to.

November 16, 1898. The appeal was dismissed with costs, the Court agreeing with the judgment appealed from.

G. F. H.

[DIVISIONAL COURT.]

JOHNSTON BROTHERS V. ROGERS BROTHERS.

Contract—Correspondence—Quotation of Prices—Acceptance.

The defendants, dealers in flour, wrote to the plaintiffs, bakers, that they wished to secure their patronage as customers, and quoting prices and terms for specified kinds of flour, adding a suggestion that the plaintiffs should "use the wire to order." The plaintiffs answered by telegram that they would take two cars "at your offer of yesterday." The defendants did not deliver the flour, and the plaintiffs sued for damages for non-delivery:—

Held, that there was no contract.

Harty v. Gooderham (1871), 31 U. C. R. 18, distinguished.

Statement. AN appeal by the defendants from the judgment of William Elliott, senior Judge of the County Court of Middlesex, in favour of the plaintiffs in an action in that Court, the facts of which are fully set out in the following opinion delivered by that Judge:—

The plaintiffs are bakers, and seek to recover damages from the defendants for breach of a contract for the sale and delivery of a quantity of flour.

The following letter is the basis of the plaintiffs' claim:—

“Toronto, April 26, 1898. Judgment.

Dear Sir :—

C. C. Judge.

We wish to secure your patronage, and, as we have found the only proper way to get a customer is to save him money, we therefore are going to endeavour to save you money.

It is hardly prudent for us to push the sale of flour just now, as prices are sure to advance at least 50 cents per barrel within a very few days, and to give you the advantage of a cut of from 20 to 25 cents per barrel seems a very foolish thing, but nevertheless we are going to do it, just to save you money and secure your patronage.

We quote you (R. O. B. or F. O. B.) your station, Hungarian \$5.40 and strong Bakers \$5.00, car lots only, and subject to sight draft with bill of lading.

We would suggest your using the wire to order, as prices are so rapidly advancing that they may be beyond reach before a letter would reach us.

Yours respectfully,
Rogers Bros.”

This communication was received by the plaintiffs on the 27th April. The plaintiffs telegraphed the defendants the same morning as follows :—

“London, April 27, 1898.

To Rogers Bros., Confederation Life Building, Toronto.

We will take 2 cars Hungarian at your offer of yesterday.

Johnston Bros.”

On the same day, namely, the 27th April, the plaintiffs received the following communication by telegraph :—

“Toronto, Ont., April 27, 1898.

Flour advanced sixty. Will accept advance of thirty on yesterday's quotations. Further advance certain.

Rogers Bros.”

Then followed a letter, dated the 28th April, from Messrs. Hellmuth & Ivey, solicitors for the plaintiffs, calling upon the defendants to fulfil the order “according

Judgment. to the offer contained in your letter of the 26th and duly
C. C. Judge. accepted by them by wire on April 27th; and upon your
refusal damages will be demanded."

I do not think it is necessary to give the communications which followed, but they are to the effect, on the part of the defendants, that the letter of the 26th April was only a quotation of prices, and not an offer to furnish the flour; and thus a contract is denied.

But, first, the objection is taken on behalf of the defendants that this communication of the 26th April is not addressed to the plaintiffs, or indeed to any one by name.

To this it is answered that it was enclosed in a stamped envelope addressed to "Johnston Bros., Bakers, London," and that this is sufficient to comply with the Statute of Frauds, according to *Richard v. Stillwell* (1885), 8 O. R. 511, in which case the envelope was lost, as in this case. But the learned Chancellor held that the receipt and address on the envelope were sufficient to satisfy the statute. Some stress is placed upon the statement of Mr. Fleming, on behalf of the defendants, that the address on the envelope was "Joseph Johnston," not "Johnston Bros." But I think the evidence of Mr. Johnston is to be preferred, and I find that the address was "Johnston Bros." It appears that "Johnston Bros." signifies Joseph Johnston alone. I do not think that it is material whether the envelope was addressed to Johnston Bros. or to Joseph Johnston. However, I find it was addressed to Johnston Bros. This case of *Richard v. Stillwell* appears to be approved by Mr. Justice Ferguson in his judgment in *White v. Tomalin* (1890), 19 O. R. at p. 521, where he says as to the loss of the envelope that the parol evidence received was "in the nature of evidence shewing the contents of a lost document."

The next line of defence is that the alleged contract set up in the plaintiffs' statement of claim is merely a quotation, and an offer to deal with the defendants, and does not, upon its acceptance, furnish the necessary elements for a completed contract. If it is merely a quotation, the

plaintiffs' case must fail. But, in addition to a strong Judgment.
invitation to deal with the defendants, the mode of pay- C. C. Judge.
ment is mentioned, and the use of the telegraph is
suggested, which are matters foreign to a mere quotation
of prices. No time was thus lost for the plaintiffs' accept-
ance, and following next comes the message about the
sudden increase of prices, and the refusal of the defendants.
To my mind there was an offer at a price and an accept-
ance to the extent of two cars of Hungarian, which it is
not alleged was an unreasonable quantity.

Harty v. Gooderham (1871), 31 U. C. R. 18, and *Thorne*
v. Barwick (1866), 16 C. P. 369, I think, support the con-
tention that there was in this case an offer, an acceptance,
and a contract.

The defendants, in the second paragraph of their defence,
admit that their business in Ontario as millers was repre-
sented by one T. Francis Fleming, who is their special
agent for the purpose of securing orders for the sale of
their various brands of flour and grain. But they urge
that this Mr. Fleming had no authority to bind the defen-
dants by any contract, his instructions requiring that all
orders should first be sent to them for approval.

In the affidavit on production Fleming swore he was
the "duly authorized agent of the defendants within
the Province of Ontario."

Thus it is certain that Fleming was the agent of the
defendants in the conduct of their business in Ontario.
But the defendants say that this agency was subject
to the special conditions that he had only to send out
quotations and get offers, subject to the approval of his
principals.

This qualification of the general agency, so far as evi-
dence is concerned, was entirely upon the statements made
under oath by Fleming, and certainly the evidence is not
satisfactory and in some instances is contradictory. But
he admits that he never notified the persons he dealt with
of any special condition. In his cross-examination he was
asked: "Was the whole transaction between you and the

Judgment. party you sold to, with you?" And his answer was:
C. C. Judge. "That is right."

The conclusion I arrive at is that the plaintiffs honestly believed that Fleming was the properly constituted agent of the defendants in the conduct of their business in Ontario, and knew nothing of any limitation of authority.

As to the law on a subject of this kind, in Smith's Mercantile Law, 10th ed., p. 136, it is thus explained: "He who accredits another by employing him, must abide by the effects of that credit, and will be bound by contracts made with innocent third persons in the seeming course of that employment, and on the faith of that credit, whether the employer intended to authorize them or not."

This seems to be a correct summary of the law as laid down by Lord Ellenborough in *Pickering v. Busk* (1812), 15 East 38, so frequently referred to by Story in his treatise on Agency.

Perhaps, had the position of the parties been reversed, and prices had fallen instead of increasing, the liability of the present plaintiffs might have been effectually established.

As to the damages claimed, the plaintiffs had to purchase the same goods from another party at a higher price, for which they had to pay \$123 more; and for that amount, with costs, I give judgment for the plaintiffs.

The grounds of appeal were:—

1. That the letter of the 25th April was not an offer of a contract sufficient to form a binding contract, but merely a quotation of prices, and an offer to treat or deal with the plaintiffs, and an invitation to them to send in their orders for acceptance or refusal.

2. That the letter of the 26th April was not addressed to the plaintiffs, but to one Joseph Johnston, and should have been so found by the trial Judge.

3. That the letter and other correspondence were written by one T. Francis Fleming, who had no authority to bind the defendants by any contract.

The appeal was heard by a Divisional Court composed of ARMOUR, C.J., FALCONBRIDGE and STREET, JJ., on the 26th January, 1899. Statement.

W. Carleill-Hall and *J. W. Payne*, for the defendants.
Hellmuth, for the plaintiffs.

The cases cited by counsel are all mentioned in the judgments.

February 2, 1899. The judgment of the Court was delivered by

FALCONBRIDGE, J.:—

The facts and the correspondence are fully set out in the very careful judgment of the learned Judge.

I shall not refer to the second and third grounds of appeal further than to say that they have been fully considered, and, to my mind, satisfactorily disposed of, by the trial Judge.

The real crux of the case is whether there is a contract.

Leaving out the matters of inducement (in both the legal and the ordinary sense) in the letter of the 26th, the contract, if there is one, is contained in the following words:

Letter defendants to plaintiffs.

“26th April, 1898.

We quote you, F. O. B. your station, Hungarian \$5.40 and strong Bakers \$5.00, car lots only, and subject to sight draft with bill of lading.”

Telegram plaintiffs to defendants.

“27th April, 1898.

We will take 2 cars Hungarian at your offer of yesterday.”

I should have expected to find American authority as to the phrase “we quote you,” which must be in very common use amongst brokers, manufacturers, and dealers in the United States; but we were referred to no decided case, and I have found none where that phrase was used.

Judgment. In the American and English Encyclopædia of Law, 2nd ed., vol. 7, p. 138, the law is stated to be: "A quotation of prices is not an offer to sell, in the sense that a complete contract will arise out of the mere acceptance of the rate offered or the giving of an order for merchandize in accordance with the proposed terms. It requires the acceptance by the one naming the price, of the order so made, to complete the transaction. Until thus completed there is no mutuality of obligation."

Falconbridge,
J.

Of the cases cited in support of this proposition, *Moulton v. Kershaw* (1884), 59 Wis. 316; 48 Am. Rep. 516, is the nearest to the present one, but in none is the word "quote" used.

The meaning of "quote" is given in modern dictionaries as follows:

Standard—(Com.) To give the current or market price of, as bonds, stocks, commodities, etc.

Imperial, ed. 1884—In *com.*, to name, as the price of an article; to name the current price of; as, what can you quote sugar at?

Century—(Com.) To name as the price of stocks, produce, etc.; name the current price of.

Webster—(Com.) To name the current price of.

Worcester—To state as the price of merchandize.

See also Black's Law Dictionary, *sub tit.* "Quotation."

There is little or no difference between any of these definitions. Now if we write the equivalent phrase into the letter—"We give you the current or market price, F. O. B. your station, of Hungarian Patent \$5.40 * *—" can it be for a moment contended that it is an offer which needs only acceptance in terms to constitute a contract?

The case of *Harty v. Gooderham* (1871), 31 U. C. R. 18, is principally relied on by the plaintiffs. But that case presents more than one point of distinction. There the first inquiry was from the plaintiff, which, I think, is an element in the case. He writes the defendants to let him "know your lowest prices for 50 O.P. spirits," etc. To which defendants answered, mentioning prices and par-

particulars: "Shall be happy to have an order from you, to which we will give prompt attention," which the Court held to be equivalent to saying "We will sell it at those prices. Will you purchase from us and let us know how much?" And so the contract was held to be complete on the plaintiff's acceptance.

But there is no such offer to sell in the present defendants' letter. *Harvey v. Facey*, [1893] A. C. 552, is strong authority against the plaintiffs.

I have not overlooked the concluding paragraph of the letter, viz., "We would suggest your using the wire to order, as prices are so rapidly advancing that they may be beyond reach before a letter would reach us." The learned Judge considers this to be one of the matters foreign to a mere quotation of prices. I venture, on the contrary, to think that this suggestion is more consistent with, and perhaps consistent only with, a mere quotation of prices, which might vary from day to day or from hour to hour. There could be no question of the prices becoming "beyond reach" in a simple offer to sell at a certain price.

In my opinion, the plaintiffs have failed to establish a contract, and this appeal must be allowed with costs, and the action dismissed with costs.

See also *Thorne v. Barwick* (1866), 16 C. P. 369; Am. & Eng. Encyc. of Law, 2nd ed., vol. 7, pp. 125, 128, 133, 138; *Ashcroft v. Butterworth* (1884), 136 Mass. 511; *Fulton v. Upper Canada Furniture Co.* (1883), 9 A. R. 211.

E. B. B.

[DIVISIONAL COURT.]

RE ROBERTSON AND CITY OF CHATHAM.

Municipal Corporations—Local Improvements—Frontage System—Assessment—Benefit—Appeal—Court of Revision—County Court Judge—Prohibition—R. S. O. ch. 223, secs. 664-685.

The municipality in 1894 by by-law adopted the local improvement system as to the making of sewers, and also passed a general by-law for the purposes mentioned in sub-sec. 1 of sec. 612 of the Municipal Act then in force, 55 Vict. ch. 42 (O.).

The appellant's lands fronting on a street along which the municipality proposed to make a sewer, were, with the other lands so fronting, assessed at a uniform rate per foot frontage, for a portion of the cost of the sewer, and certain lands not fronting on the street, but which would derive benefit from the sewer, were assessed for the remainder of the cost.

The appellant appealed against his assessment to the Court of Revision, but his appeal was dismissed, and he then appealed to the County Court Judge, who found that the lands in question would be benefited by the proposed sewer, but that the assessment was too high, and he reduced it, directing that the amount struck off should be assessed *pro rata* over the other properties included in the assessment :—

Held, that he had no jurisdiction to do so; and prohibition awarded against the enforcement of his order.

Having regard to the provisions of the Municipal Act, R. S. O. ch. 223, secs. 664-685, relating to local improvements, the method of assessment, in such a case as this, is to determine what proportion of the cost the land fronting on the street shall bear, and what proportion the land not so fronting shall bear, and assess the proportion appertaining to each class according to its frontage, and not according to the proportion of benefit received by each parcel or lot of land.

History and construction of the legislation.

Statement.

AN application by the corporation of the city of Chatham for prohibition to the Judge of the County Court of Kent to prevent the enforcement of a decision of the Judge allowing in part an appeal by A. K. Robertson from the decision of the court of revision for the city of Chatham confirming the assessment of the appellant in respect of a sewer. The motion was made upon the ground that the Judge had no jurisdiction to reduce the assessment, under the circumstances set out in the judgments.

The motion was heard by MEREDITH, J., in Chambers, on the 27th June, 1898.

Aylesworth, Q.C., for the applicants.

J. T. Small, for A. K. Robertson.

August 2, 1898. MEREDITH, J.:—

Judgment.

Meredith, J.

Whatever may be said for or against the system, the Legislature certainly has, in the local improvements clauses of the Municipal Act, permitted a taxation for local works and improvements, at an equal rate per foot of the frontage of all real property immediately benefited thereby: see sec. 664; sec. 665, sub-sec. (1), and the proviso to sub-sec. (2); sec. 673, sub-secs. (4), (5), (6), and (7); sec. 674, especially sub-sec. (3); sec. 686, sub-secs. (1) and (2); and the form of by-law and of notice prescribed in these clauses: and this municipal council certainly intended to exercise that power in the assessment in question: these things are undisputed, and, it seems to me, are indisputable.

Any question whether the municipal council has validly exercised that general power in this instance, does not arise upon this motion; but can be determined upon the pending motion to quash the by-law, or in other proceedings where that question can be raised. In this case, the assessment was made by the council, appealed against by the respondent, and reduced by the County Court Judge, being treated throughout as a valid proceeding, the one question being:—Was the assessment of the respondent's lands excessive? So that the one question for consideration at present is:—Had the County Court Judge power to change the equal assessment according to the frontage to an unequal one, based upon his judgment of what is a just and equitable share of the cost of the work to be charged upon the respondent's land?

Primâ facie there would seem to be no such power; because it would be destructive of the essential feature of this method of taxation. The two schemes, the one of assessment according to the proportion of benefit actually received by all of the land, as under the drainage legislation, and the other according to the frontage only, are distinctly referred to and brought in contrast in the portions of the Act to which I have referred, and in other

Judgment. parts of the local improvements clauses. The methods are
Meredith, J. very different, though the result may be often, if not
always, the same. If, therefore, there be power to make
such changes as the County Court Judge has made, that
power ought plainly to appear in the enactment.

As giving such power the respondent relies entirely
upon sub-sec. (5) of sec. 671, which gives "the same right
of appeal" from the proposed assessment as is provided
for in the Municipal Drainage Act; but that cannot have
been intended to give the court of revision or the County
Court Judge power to change the whole system of assess-
ment from one "by a frontage rate" to one "according to
the proportion of benefit received;" and the less to merely
take off part of the frontage rate from one parcel of real
property immediately benefited, and distribute that part
over the other parts, as was done in this case, so that the
assessment cannot be said to be upon either system.

The same right means a right of the same character,
and, no doubt, as ample as the differences in the schemes,
and in the subject matter of the proceedings, will permit.
The proviso to sub-sec. (6) of the same section—671—
was, no doubt, added to make this plainer, and to indicate
just what power the County Court Judge should have,
and it throughout points to alterations consistent with a
frontage rate only, and finally enacts that such Judge
"shall only interfere with and alter the assessment of the
said lineal frontage so far as may be necessary to carry
into effect any of the changes which are occasioned by his
judgment." All this would be more apparent if the work
were a sidewalk instead of a sewer, which may affect
drainage.

And, besides this, the power which is claimed for and
was exercised by the County Court Judge in this case is
expressly given, not to him, nor to the court of revision,
but to the municipal council, in sec. 673, sub-sec. (6), con-
sistently with the whole scheme of frontage taxation, and
a provision which seems to me so effectual an answer to
this claim, that I shall now read it:—

(6) Where the lands on either side of a street, lane, or alley in a city, town or village are, in the opinion of the council, unfit from any cause for building purposes, and the council deems it inequitable to assess the same for local improvements at so high a rate as the building lots fronting on said street, lane or alley, the council shall, in all such cases, determine in what proportion the cost of any such improvement shall be borne by the lands on each side of said street, lane or alley, respectively.

Judgment.
Meredith, J.

It is, therefore, in my judgment, not within the power of the County Court Judge to change, as he intends doing, the equal rate per foot frontage of taxation of the lands immediately benefited by the work; and an order may go prohibiting him from so doing. The applicants are entitled to costs of the motion.

In order that it may not be thought that any points made by the respondent's counsel have been overlooked, I may add that there seems to me to be no force in the contention that the proviso to sub-sec. (6) of sec. 671 is not applicable to this case, because it does not appear that the assessment was made under any by-law; for this municipal council has adopted the usual and convenient course, expressly permitted by the Act, of passing a general by-law applicable to all such works, and has postponed the passing of the particular by-law applicable to this work until after the completion thereof: see secs. 667 and 672. And, as I have already intimated, I should have reached the same conclusion if that proviso had never been added.

Nothing turns upon the assessment of lands not immediately benefited, and therefore they have not been mentioned.

There is yet time to prevent the learned County Court Judge from giving effect to his opinion. His memorandum shews, I think, that he retains the matter pending the judgment of this Court, which he desires to have for his guidance upon the question involved.

Statement.

A. K. Robertson appealed from this decision to a Divisional Court, and his appeal was heard by MEREDITH, C.J., ROSE and MACMAHON, JJ., on the 6th December, 1898. The arguments are fully stated in the judgment of MEREDITH, C.J.

J. T. Small, for the appellant, cited *Re Burrowes* (1868), 18 C. P. 493; *Robertson v. Cornwell* (1878), 7 P. R. 297, 301; *Mayor of London v. Cox* (1867), L. R. 2 H. L. at p. 282; *Re Cummings and County of Carleton* (1894), 25 O. R. 607; Shortt on Informations, p. 429.

Aylesworth, Q.C., for the city corporation.

January 14, 1899. MEREDITH, C.J. :—

The municipality of Chatham adopted the local improvement system as to certain classes of works, among them the making, enlarging, or prolonging of common sewers, by by-law passed on the 8th January, 1894, in accordance with the provisions of the Municipal Act then in force, 55 Vict. ch. 42, sec. 625 (O.).

The council of the municipality, under the authority of sec. 615 of the same Act, on the 5th November, 1894, passed a general by-law for the purposes mentioned in subsec. 1 of sec. 612.

On the 16th August, 1897, the engineer of the municipality reported to the mayor and aldermen that he had, in compliance with their instructions, made an estimate of the cost of construction of a twelve-inch sewer from the man-hole in Queen street sewer at Park avenue, to Mud Creek, along the centre of Queen street; he further reported that an enlarged capacity was proposed to be given to the sewer in order to afford an outlet for lands not abutting or fronting on Queen street, and that he had made an assessment against these lands for the proportion of the cost which, in his judgment, they ought to bear; he also reported as to the cost of the proposed work, and recommended that the special assessment should extend over a period of fifteen years, and be collected on the equal annual

instalment plan; and he made an assessment against the roads benefited, as well as the lands benefited, which abut or front on Queen street, and also upon the lands benefited which do not abut or front on Queen street, for the outlet which the sewer, by reason of its increased capacity, would afford for the drainage of these lands, and annexed a schedule of the lands and roads found to be benefited, shewing the proportion of the cost to be borne by each of them.

Judgment.

Meredith,
C.J.

The amount charged against the lands fronting on Queen street is a uniform rate of thirty-two cents per foot frontage, and that charged against the lands which do not front or abut on Queen street is a uniform rate of four cents per foot of the frontage of those lands on the streets upon which they respectively front.

The appellant, Robertson, is the owner of lands having a frontage of 817 feet on that part of Queen street on which the sewer was proposed to be built, and according to the report of the engineer the proportion of the cost of the sewer to be assessed against these lands is \$261.44, being at the rate of 32 cents per foot of their frontage.

In the affidavit of the city clerk filed on the motion for prohibition, the assessment upon the lands of the appellant is stated to be \$239.95, but in what way the engineer's figures were reduced to that sum does not appear upon the material before us.

The appellant appealed against his proposed assessment to the court of revision, but his appeal was dismissed, and he then appealed from the court of revision to the County Court Judge.

The County Court Judge found that the appellant's lands would be benefited by the proposed sewer, but that the assessment was too high, and he accordingly reduced it from \$239.95 to \$47.87, and directed "the amount so struck off to be assessed over the other lands and roads assessed, *pro rata*."

The municipality thereupon applied for an order prohibiting the County Court Judge from reducing or inter-

Judgment. interfering with the assessment of the appellant's lands, and
Meredith, from issuing any order interfering with the decision of the
C.J. court of revision with regard to it.

On the argument before the County Court Judge and the motion for prohibition, as well as on the appeal to us, the respondent municipality contended that the County Court Judge had no jurisdiction to interfere with the assessment proposed to be made on the appellant's lands, because none of the circumstances upon the existence of which, according to their contention, the jurisdiction of the County Court Judge to do so, depended, existed, and were found not to exist by the learned Judge himself.

Mr. Justice Meredith, by whom the motion for prohibition was heard, gave effect to the contention of the municipality and made an order prohibiting the County Court Judge from "changing the assessment imposed on the lands of the appellant."

The present appeal is from that order.

The provisions of the Municipal Act dealing with local improvements in townships, cities, towns, and villages, are secs. 664 to 685, both inclusive, and one may, I hope, without disrespect to the Legislature, speak of them as somewhat complicated, cumbrous, and contradictory.

I have always thought that the principle of the frontage system of taxation first introduced into our municipal system as far back as the year 1850, by 12 Vict. ch. 81, secs. 81 and 106, though at that time confined within very narrow limits, was that the property fronting or abutting on the street on which the improvement was made should bear the cost of it, each foot of frontage contributing equally with every other foot towards that cost, though in recent years modifications have, no doubt, been made in the system so as to permit of lands benefited, though they do not front or abut on the street on which the improvement is made, being made liable to contribute towards defraying the cost of it, and in the opposite direction by providing means of avoiding the injustice of an equal per foot frontage rate in particular cases, where a rigid appli-

cation of the frontage system would work injustice, as in the case of corner, triangular, and other irregularly shaped lots (sec. 673 (4)), lands on the same street unequally benefited (sec. 673 (6)), and lands fronting on parks, squares, public drives, or boulevards (sec. 673 (7)).

It is, however, contended by the appellant that such is not the principle of the "frontage system," and that the only change in the mode of assessment for local improvements which was introduced by the adoption of it was that the various amounts which the respective lots benefited are found liable to contribute to the cost of the improvement are required to be levied by an equal rate on each foot of their respective frontages, instead of their being levied by a rate on each of the respective parcels benefited according to its value, whether with or without improvements, and whether the value be assessed or actual value, as had been the manner of assessing for local improvements, at different times previously.

The principal difficulty in the way of the respondents is presented by the provisions of sub-sec. (1) of sec. 664 (unless otherwise stated, the references are to the sections of the Municipal Act, R. S. O. ch. 223), which authorizes the passing of by-laws for providing the means of ascertaining and determining what real property will be immediately benefited by any proposed work or improvement, the expense of which is proposed to be assessed as thereafter mentioned upon the real property benefited thereby, and of ascertaining and determining the proportions in which the assessment of the cost thereof is to be made, on the various portions of real estate so benefited, and gives the same right of appeal from any such assessment or proposed scale of assessment to the court of revision, and from the court of revision to the County Judge, as is provided for by the Municipal Drainage Act, R. S. O. ch. 226.

It was urged by the appellant that the provision for ascertaining and determining the proportions in which the assessment of the cost of the work or improvement is to be

Judgment.

Meredith,
C.J.

Judgment. made on the various portions of the real estate benefited is inconsistent with the idea of the cost being charged on each lot or parcel of land according to its frontage, and irrespective of the benefit which it will derive from the work or improvement, and it is said that if the cost must be borne in that way, no inquiry, except as to the extent of the frontage, would be necessary to be made.

Meredith,
C.J.

This argument is not without force, but if, from an examination of the whole body of the legislation on the subject, one is led to the conclusion that what I have said I have always understood to be the principle of the frontage system is the true principle of it, one must endeavour to reconcile the provision which is relied on with the general scheme of the legislation.

I proceed, therefore, to consider the provisions of the sections relating to local improvements for the purpose of ascertaining what is the meaning of the provision requiring the special rate to be an annual rate according to the frontage thereof on the real property benefited.

Sub-section 2 of sec. 664 enables the council of certain classes of municipalities to pass by-laws for assessing and levying; by means of a special rate, the cost of certain enumerated classes of works and improvements.

Section 665 (1) provides that "the special rate to be so assessed and levied shall be an annual rate according to the frontage thereof, upon the real property immediately benefited by the work or improvement."

If these two provisions were the only ones, it would appear to be reasonably clear that the special rate contemplated must be an equal rate per foot of the frontage of the real property benefited, and it was still more clear when, as the law at one time provided, the special rate was to be imposed not as now on the real property benefited, but only on the real property fronting or abutting upon the street or place whereon or wherein the improvement or work was proposed to be done or made. (R. S. O. 1887 ch. 184, sec. 612 (4).)

By sec. 665 (3), applicable to certain townships only, if

the council determines that any real property other than that fronting or abutting on the street in which the improvement is to be made is specially benefited and ought to be charged with a part of the cost of it, and determines also the proportion in which the cost of the improvement is to be assessed against the land so benefited, the council is authorized, upon the petition of three-fourths in number of the owners representing three-fourths in value of the lands to be benefited, to assess and levy by frontage rate, in the same way as would be done in the case of fronting or abutting lands, the proportion of the cost chargeable against the lands benefited, whether they front or abut on the street or not; but it is further provided that the council, instead of levying by a frontage rate, may provide that the cost of the improvement be assessed and levied by a special rate upon the lands benefited thereby, according to the proportion of benefit received therefrom, "instead of by a frontage rate," these latter words being repeated at the end of the proviso.

Judgment.
Meredith,
C.J.

The language of this sub-section indicates, I think, clearly, that it was drawn under the idea that the frontage rate which the Act required to be levied was an equal rate on the whole of the land benefited according to its frontage, and the provision for enabling the council to substitute for that kind of rate a special rate upon the lands benefited according to the proportion of the benefit received by them, excludes the idea of the latter mode of assessment being applicable under the local improvement system.

By sec. 671 (6) authority is given to the County Judge, if he finds that lands other than those assessed are or will be specially benefited, to add such lands to the lands to be assessed.

Sec. 673 (2) provides that where, in order to afford an outlet for the sewerage and drainage of real property other than that fronting or abutting upon the street in which a sewer is constructed, the sewer is of larger capacity than is required for the efficient sewerage and drainage of the real property fronting or abutting on the street, the council

Judgment. may impose a special assessment upon any other real
Meredith, property benefited by the construction of the drain, in the
C.J. manner provided by secs. 671 and 672.

By sec. 673 (4) councils are authorized to provide, by by-law, an equitable mode of assessing corner lots, triangular, or other irregular (*sic*) shaped pieces of land situate at the intersections or junctions of streets, having due regard to the situation, value, and superficial area of such lots, as compared with adjoining lots and pieces of land assessable, and may charge the amount of the allowance made on any such lot or piece of land, on the other real property fronting on the improvements, or may assume it as part of the municipality's share of the cost of the improvement.

Any such assessment is made subject to appeal to the court of revision, and from the court of revision to the County Judge.

Section 673 (6) provides that where lands on either side of a street are, in the opinion of the council, unfit from any cause for building purposes, and the council deems it inequitable to assess them "at so high a rate as the building lots fronting on said street," the council shall determine in what proportion the cost of the improvement is to be borne by the lands on each side of the street.

Sec. 673 (7) makes special provision for the assessment of real property adjoining or fronting on a park, square, public drive, or boulevard.

Sec. 674 (1) applies to the construction or repair of bridges or culverts on a street, and to the opening up and extension of streets, and makes provision that where, in the opinion of the council, it is inequitable to charge the whole cost of the improvement on the lands fronting on them, the council shall determine what lands are benefited by the works and improvements, and the proportion in which the cost of them shall be assessed against the lands benefited, "and the proportion, if any, of the cost of the improvement" to be assumed by the municipality as its share thereof.

The assessments made under this section are made subject to an appeal to the court of revision, and from the court of revision to the Judge, in like manner as in the case of other special assessments for local improvements under the Act.

Judgment.

Meredith,
C.J.

By sub-sec. (2), in cases in which sub-sec. (1) applies, the council is required "to assess and levy the proportion of the cost chargeable against the lands benefited by (*sic*), but not fronting or abutting upon such street, lane, or alley by a frontage rate, in like manner as the same would be assessed and levied in the case of lands fronting or abutting upon the street, lane or alley, or the portion thereof whereon or wherein the improvement is made or to be made."

Sub-section (3) authorizes township councils to provide by by-law that the cost of the works may be assessed and levied by a special rate on the lands benefited according to the proportion of benefit received from the improvement, instead of by a frontage rate.

Section 686, sub-secs. (1) and (2), may also be referred to, though these sub-sections deal with extensions of the local improvement system, and are not in the group of sections relating to local improvements. They enable councils by a three-fourths vote of the full council to provide for sweeping, lighting, and watering of streets by means of a special rate on the property therein, according to its assessed value, instead of by a special rate according to frontage, which is to be the mode adopted in the absence of such a vote.

All of these special provisions, designed to meet special cases, seem to me to be consistent only with the "frontage system," upon which they are engrafted, being, in the view of the framers of them, a mode of taxation according to which every foot of frontage of the property benefited "on the improvement" is required to pay the same proportion of the cost of the improvement, and most of them would appear to have been wholly unnecessary if that be not the principle of that form of taxation, because if, as the ap-

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pellant contends, the inquiry be what, as respects each particular lot or parcel of land, its proportion of the cost should be according to the benefit to be derived by it from the improvement, all of these special matters would necessarily be considered and dealt with in making that inquiry.

Where the Legislature has intended that each lot or parcel of land shall contribute to the cost of a local improvement according to the actual benefit which it will receive, as is the case under the Municipal Drainage Act, R. S. O. ch. 226, a very different form of enactment as to the rate to be levied is adopted. See sec. 19, sub-sec. 3, which provides that the rate is to be a special rate in proportion as nearly as may be to the respective liabilities to contribute by those whose lands are assessed for a part of the cost of the work; and also form of by-law, schedule B.

An examination of the course of the legislation on the subject of "local improvements," since that mode of taxation was introduced into our municipal system, may be of assistance; and, considering the general importance of the subject to all municipalities, no excuse is needed for my entering upon that examination.

The first Act which extended the local improvement system beyond the narrow limits within which it was confined by the earlier legislation was 22 Vict. ch. 40 (1859). The operation of the Act was confined to cities.

Its first section, sub-division 1, provided that the councils of cities might pass by-laws:

1. For providing the means of ascertaining and determining what real property will be immediately benefited by any proposed improvement, the expense of which is proposed to be assessed as hereinafter mentioned upon the real property immediately benefited thereby; and of ascertaining and determining the proportions in which the assessment is to be made on the various portions of the real estate so benefited; subject in every case to an appeal to the County Court Judge, in the same manner and on the same terms, as nearly as may be, as an appeal from the court of revision in the case of an ordinary assessment.

It will be seen that the language of this provision is the same, save as to the nature of the appeal given, as that of sec. 664, sub-division 1, of the present Municipal Act, R. S. O. ch. 223, except that the words "work or" have been added before the word "improvement," the word "immediately" where it occurs for the second time has been struck out, and the words "of the cost thereof" have been inserted after the word "assessment." The first of these changes was made by 47 Vict. ch. 32, sec. 20, and the other two by 53 Vict. ch. 50, sec. 38.

The assessment was to be made only on the petition of a certain proportion of the property owners, and the moneys required to be raised to pay the debentures which were authorized to be issued "to provide funds" for the improvements and the interest on the debentures, were required to be assessed and levied:

"(1) By an annual rate in the pound on the real property so benefited, according to the assessed value thereof, including the improvements thereon

(2) Or by an annual rate in the pound on the real property so benefited, according to the value thereof, exclusive of the improvements thereon;

(3) Or by an annual rate of so much per foot, equally, according to the frontage of the real property so benefited, without reference to the comparative value of the different portions thereof;

(4) Or by an annual rate on each portion of the real property so benefited, in proportion, as nearly as may be, to the benefit derived by such portion;

(5) Or partly by each of these methods, or partly by each of any two or three of them."

It is, I think, clear that according to these provisions, if the council determined to adopt either of the first three modes of assessing and levying the rate, no question would be open either upon the inquiry made under sub-division 1, or upon appeal to the County Court Judge, as to the proportion of benefit which any part of the real property benefited would derive from the proposed improvement.

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In all of these three cases, the inquiry was whether the property proposed to be charged would be immediately benefited, and the additional inquiry, in the case of number 1, as to the assessed value of that real property, including the improvements on it; in the case of number 2, as to the value of the real property exclusive of improvements; and in the case of number 3, as to frontage measurement of the real property; and it was only where the council adopted, in whole or in part, the fourth method of assessment, that the element of the amount of the benefit derived by the separate lots or parcels of land benefited entered into the inquiry.

Pushed to its logical conclusion, the argument of the appellant's counsel would apply to this enactment, but it is for me difficult to understand why the Legislature should have given the varied choice of methods of taxation which it provided, if the only object was to determine in what way the proportion of benefit derived by each lot or parcel of land (which must, according to the argument, whatever might be the mode of assessment adopted by the council, be the same in every case) should be raised in order to meet the cost of the improvement; it would indeed be a case of a mountain in labour giving birth to a "*ridiculus mus*."

The first change made in the legislation of 1859 was effected by the Municipal Act of 1866 (29 & 30 Vict. ch. 51, sec. 30), which abolished all of the five modes of assessment permitted by the former Act except the second, and thereafter and down to 1881 (44 Vict. ch. 24, sec. 26), the mode of assessment was by an annual rate on the dollar on the real property benefited according to the value thereof, exclusive of improvements, and the inquiry necessary to be made in order to determine what proportion of the cost of the proposed improvement any particular lot or parcel of land should bear was, (1) whether or not the lot or parcel of land would be immediately benefited by the proposed improvement, and (2) what the value of it, exclusive of improvements, was. These two elements, and

these only, formed the subject of investigation by the means which the council provided for ascertaining and determining the proportion in which the assessment was to be made, and by the court of revision and the County Court Judge in reviewing on appeal the action of the officer or tribunal named by the council for that purpose.

44 Vict. ch. 24, sec. 26, substituted for the mode of assessment which had prevailed from 1866 down to the time of the passing of that Act "an annual special rate on the real property so benefited according to the frontage thereof."

By 45 Vict. ch. 23, sec. 4, the council was authorized to assess and levy in manner provided by the existing enactments the cost of the improvement or work upon the real property fronting or abutting on the street or place whereon or wherein the work or improvement was proposed to be done or made, without petition, unless the work or improvement was petitioned against in manner provided by the Act.

This was the adoption for the first time of what is now called the "initiative" in regard to local improvements.

By the Consolidated Municipal Act of 1883 (46 Vict. ch. 18, sec. 612 (3)), the provisions of sec. 4 of 45 Vict. ch. 23, as to the assessment being upon the real property fronting or abutting on the street or place whereon or wherein the work or improvement was proposed to be done or made, were applied to local works and improvements, whether undertaken on the initiative or on petition or on the report of the engineer or other sanitary officer and of a committee of the council recommending the proposed work or improvement for sanitary or drainage purposes, adopted by the council, so that thereafter the rate continued to be a frontage rate, but was confined to the real property fronting or abutting upon the street or place whereon or wherein the work or improvement was proposed to be done or made.

By 55 Vict. ch. 42, sec. 613 (1), still another change was effected, and the rate was authorized to be assessed upon

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the real property extending to within six feet of, as well as that fronting or abutting upon, the street or place whereon or wherein the improvement or work is to be done or made.

Yet one more change was effected by 59 Vict. ch. 51, sec. 28, which amended sec. 613 (1), so that it should read :

“The special rate to be so assessed and levied shall be an annual rate according to the frontage thereof, upon the real property immediately benefited by such work or improvement;” and so, substituting for the word “such” the word “the,” the law stood when the assessment in question was made, and so it stands to-day : R. S. O. ch. 223, sec. 665 (1).

We have, therefore, (1) the authority to the council to pass by-laws for assessing and levying by means of a special rate the cost of the work or improvement, (2) the direction that the special rate is to be an annual rate according to the frontage thereof, upon the real property immediately benefited by the work or improvement.

Section 664 (1) must be read in the light of these provisions and so as to be consistent with them, and therefore, in ascertaining and determining the proportions in which the assessment of the cost is to be made on the various portions of the real estate benefited, whatever means the council may provide for that purpose, (subject to the exceptions to the general rule to which I have before referred) the proportion of each parcel of land must be an amount which bears the same proportion to the whole cost as its frontage bears to the entire frontage of all the parcels of land which are found to be benefited.

As the sewer for which the assessment in question is to be levied is made of larger capacity than is necessary for the purpose of draining the “abutting” real property, in order to afford an outlet for the drainage of other real property not “abutting,” the provisions of what is now sec. 673 (2) apply to the proposed work, and the real property benefited, though not abutting, is assessed for a portion of the cost of it.

In such a case the scheme of the Act appears to me to be that it shall be determined what proportion of the cost the "abutting" real property shall bear and what proportion the real property "not abutting" shall be liable for, and that the proportion appertaining to each class is to be assessed against it according to its frontage.

Judgment.

Meredith,
C.J.

It was in the year 1883, by 46 Vict. ch. 18, that were introduced the provisions already referred to, enabling the council to provide an equitable means of assessing corner lots and triangular and other "irregular shaped" pieces of land, to determine the proportions in which the cost of an improvement was to be borne by the lands on each side of the street, where the lands on either side are unfit for building purposes, and the council deems it inequitable to assess them at as high a rate as the building lots fronting on the street, and to assess lands not "abutting" on the street where the work is the construction or repair of bridges or culverts, and the extension of streets, and the council is of opinion that it is from any cause inequitable to charge the whole cost on the "abutting" lands.

An appeal was given to the County Court Judge as to the matters dealt with in the first of these cases and as to the assessments made in the second and third of them.

The powers conferred by these provisions are to be exercised by the council by by-law, and a necessary condition precedent to these modifications of the general rule governing the incidence of the tax becoming operative is the passing of the by-law, unless possibly in the case of corner and triangular or other "irregular shaped" lots. If no by-law is passed, the general rule prevails.

These provisions with some amendments which have since been made now form secs. 673 (4), (6), and 674 (1), (2), and (3), and were secs. 620 (4), (6), and 621 (1), (2), and (3), of the Consolidated Municipal Act of 1892 (55 Vict. ch. 92).

The council of the respondent municipality have not passed a by-law under what is now sec. 673 (6), and the

Judgment. County Court Judge has dealt with the assessment in question as if the matters with which that sub-section deals (lots being unfit for building purposes) had been dealt with by the council, and as on an appeal to him from the decision of the court of revision, on appeal to it from the assessment for which the by-law provides.

Meredith,
C.J.

No appeal is, however, given against the action of the council under this sub-section; the provision as to appeal was dropped in the consolidation of the Municipal Act in 1887, unless indeed it had disappeared as the result of the passing of 48 Vict. ch. 39, sec. 33, and 50 Vict. ch. 29, sec. 43. In any case, it is not found in the Consolidated Act of 1887 or in the legislation subsequent to that consolidation.

There appear to me, therefore, to be two insuperable objections to the jurisdiction of the County Court Judge to enter into the inquiry with which I am now dealing: (1) the matters dealt with did not enter into the inquiry unless the council had taken action under what is now sec. 673 (6); and (2), if action had been taken, what they had done was not subject to appeal.

It is unnecessary, in my opinion, to rely on the proviso contained in sub-sec. (6) of sec. 671 to support the order appealed from. If the proviso applies to the assessment in question, *cadit quaestio*, and if it does not, there is, for the reasons I have already given, enough to be found in the other provisions of the Act to shew that the power which the County Court Judge assumed to exercise, and which he has been prohibited from exercising, is not vested in him by the Municipal Act.

The difficulty I have in applying the proviso is that the special rate assessed in this case is not assessed upon the "abutting" lands only, but also on lands not abutting, and therefore sub-sec. (3) of sec. 671 is not applicable, and it follows, probably, that the subsequent sub-sections are inapplicable also, although, singularly enough, as the result of an obvious mistake, sec. 673 (2), already referred to, provides that the assessment on the lands benefited

which are not "abutting" lands is to be imposed in manner provided by secs. 671 and 672.

What is now sec. 673 (2) appeared first in 1888 (51 Vict. ch 28, sec. 33), when it was added to sub-sec. 2 of sec. 613 of the Municipal Act (R. S. O. 1887 ch. 184).

The reference for the manner of imposing the rate was then to secs. 618 and 619, which were the sections dealing with assessments for bridges, culverts, and street extensions, and the section was intelligible, but it was made unintelligible in recasting the local improvement sections of the Act in 1890 (by 53 Vict. ch. 50), when the numbers of the sections were changed. The result of this was that secs. 618 and 619, with some amendments that had been made in the meantime, became secs. 621 and 622; the newly numbered secs. 618 and 619 took the place of 621, 622, and 623; and sec. 613 became 620. But the reference in sub-sec. 2 to secs. 618 and 619 remained unchanged. The mistake was overlooked in the consolidation of 1892 and the subsequent legislation, and is therefore found in sec. 673 (2).

I am not to be understood as deciding that where the case comes within sub-sec. (2) of sec. 673, as this case does, the court of revision and the County Court Judge may not upon an appeal under that sub-section, determine as to the correctness of the apportionment of the cost of the sewer between the "abutting" lands and the lands "not abutting." All that I decide is that, having ascertained the proportions, there is no power to distribute the amount apportioned to a "class," if I may use that expression to denote the whole frontage chargeable, unequally among the "members of the class," using that term to denote the frontage of the separate lots or parcels of land.

The learned County Court Judge was, to the extent to which he was proceeding beyond what I have found to be the proper limits of the inquiry before him, acting without jurisdiction, and prohibition, limited as it was intended to be by the order appealed from, was properly granted, and the appeal must be dismissed with costs. ¶

Judgment. MACMAHON, J. :—

MacMahon,
J. I agree.

ROSE, J. :—

I think it is reasonably clear from an examination of the various clauses of the Municipal Act that the general scheme is to assess the cost of the lots according to their frontage, and not according to the proportion of benefit, and that where the proportion of benefit is to be considered, special provision is made. Here there is no such provision, and, in my opinion, the general scheme must be followed.

After the most careful analysis of the Act by the learned Chief Justice, it is quite unnecessary for me to refer to the particular sections.

I agree that the appeal fails and must be dismissed with costs.

E. B. B.

[DIVISIONAL COURT.]

RE McLATCHIE.

PRESTON V. LESLIE.

Trusts and Trustees—Investment—Fraud of Co-trustee—Cheque—Forging Indorsement.

L., a trustee under a will, relying upon the report of his co-trustee, a solicitor, in investing moneys of the estate, that he had made a loan on satisfactory security, joined him in signing a cheque on the estate bank account payable to the order of the alleged borrower. The solicitor trustee indorsed the cheque by forging the payee's name, obtained the money and absconded :—

Held, that L. was not chargeable with the loss.

THIS was an appeal from a certificate of the Master-Statement.
in-Ordinary in the proceedings for the administration of the estate of John McLatchie, deceased, charging the defendant John Knox Leslie with the sum of two hundred dollars appropriated by a co-trustee.

Leslie and one Nelson D. Mills had been appointed executors and trustees under the will of McLatchie, and were investing estate moneys for the benefit of a beneficiary who was entitled to the income for her life.

The other facts appear in the judgment.

The appeal was argued on September 7th, 1898, before a Divisional Court composed of MEREDITH, C.J., ROSE and MACMAHON, JJ.

G. G. S. Lindsey, for the appeal. The Master found that Leslie was not liable for the cheque given for the Hinds' loan, because it was proved Mills had forged Hinds' indorsement, and he should have found the same in the Ryan case, for although Ryan was not connected by evidence with a loan to him as fully as Hinds was, it was proved that the endorsement on the cheque was not his signature and that he was the only Cornelius Ryan in the city: R. S. O. ch. 129, sec. 3. Mills was a solicitor and

Argument. Leslie trusted and relied upon him which any trustee is entitled to do without being charged with negligence; much more so when he was a co-trustee: *Re Gasquoine, Gasquoine v. Gasquoine*, [1894] 1 Ch. 470; *Bacon v. Bacon* (1800), 5 Ves. 331. If a trustee is passive he is not liable: *Re Speight, Speight v. Gaunt* (1883), 22 Ch. D. 727; *King v. Hilton* (1881), 29 Gr., at p. 382. Although for four years the forgery was undiscovered, this is not a case of neglect by Leslie for any long time, as Mills during this time paid the interest to the beneficiary until she died: *McCarter v. McCarter* (1884), 7 O. R., at p. 249; *Re Crowter, Crowter v. Hinman* (1885), 10 O. R., at p. 164.

E. Coatsworth, for the plaintiff and defendants Hutcheson & Medlar, contra. The evidence shews Leslie was not a passive but an active trustee and made enquiries about all the loans other than this one; and as to this he should have enquired as the loan was for \$400 and the cheque given was only for \$200 and he knew Mills was doing wrong with the trust funds: *Wynne v. Tempest* (1897), 13 Times L. R. 360; Williams on Executors, 9th ed., 1727.

J. H. Moss, for the defendants the Cokerams, on same side. The onus of freeing himself from liability is on Leslie and he cannot by simply alleging non-interference free himself from it. If a trustee relies upon the word of his co-trustee as to the actual existence of a security he does so at his own risk.

Lindsey, in reply.

January 7, 1899. The judgment of the Court was delivered by

ROSE, J. :—

This was an appeal from the certificate of the Master-in-Ordinary, dated 7th March, 1898, by which the defendant John Knox Leslie was held liable for the sum of \$200, obtained by fraud and forgery from the funds of the estate by his co-executor and co-trustee, Nelson D. Mills.

The Master-in-Ordinary found Leslie liable for the sum of \$200, under the following circumstances : Mills, who was a solicitor, represented to his co-executor and co-trustee, Leslie, that he had agreed to advance to Cornelius Ryan the sum of \$400, that the security was satisfactory, and the papers had been duly executed, and presented him the cheque in question for \$200 on account of the \$400, which was made payable to C. Ryan.

Judgment.

Rose, J.

This cheque on the trust account was signed by Leslie and by Mills, and subsequently the endorsement in the name of C. Ryan was forged by Mills and the money obtained. I state that the signature was forged by Mills, because although the Master-in-Ordinary did not so find, not being satisfied with the evidence of the fact, I think there is no reasonable doubt as to the fact.

One Cornelius Ryan was well known to the defendant Mills ; he knew him as a student in St. Thomas, and as a student in Toronto ; and afterwards when he started in business ; and both having at the time of this transaction, as I gathered from the evidence, offices in the same building.

I have no doubt, and would find as a fact, that Mills was using the name of this Cornelius Ryan for this transaction. As a matter of fact, apart from the general statements made by Mills to Leslie, that everything was all right, Leslie had no information about the matter. He possibly was neglectful in not asking on what property the advance was being made ; but his neglect in this respect I think has not led to this loss.

Mills being a solicitor, and being trusted by the testator, and no circumstance of suspicion as far as the evidence shews having arisen to lead Leslie to have lack of confidence in Mills' integrity, I think he was quite justified in taking Mills' statements as to the application for the loan and the execution of the documents, and that the time had come for the payment over of the money. Any inquiry as to who the alleged borrower was would not, as far as it appears, have led to any suspicion or further inquiries ; indeed, the statement that it was the Cornelius Ryan

Judgment. referred to would have allayed rather than have aroused suspicion. That being so, I do not see how Leslie could be held liable for the fraud and criminal conduct of Mills.

Rose, J.

If Mills had not been co-executor and co-trustee and Leslie had trusted him to the extent that he did trust him, apart from the question of inquiring about the character of the security, I think he would have been following the ordinary course of business. And the fact that he was co-executor and co-trustee makes in Leslie's favour. See Williams on Executors, 9th ed., p. 1731, where it is laid down: "But if one executor places the property of the testator in the hands of the other, who happens to be a banker, or in such situation that the act is not imprudent, the executor so depositing shall not be charged in case of a loss, for if he had been a sole executor, and had, under the same circumstances, placed the money in a banker's hands he would not have been liable." The testator had by appointing Mills as an executor shewn that he trusted him as a proper person to act in a fiduciary capacity: see *In re Gasquoine, Gasquoine v. Gasquoine*, [1894] 1 Ch., p. 474; *Barnard v. Bagshaw* (1862), 3 D. J. & S. 355; *Bacon v. Bacon* (1800), 5 Ves. 331; *Re Speight, Speight v. Gaunt* (1883), 22 Ch. D. 727; R. S. O. ch. 129, sec. 3.

It is perfectly clear to my mind that the endorsement on the back of the cheque is an attempt to imitate the handwriting of the witness Cornelius Ryan, who wrote his name in the presence of the Master, his signature being an exhibit in the cause. So that I find a representation by Mills to Leslie of a loan to a real person and an issuing of a cheque in the name of such person, and a forging of that name by Mills, and thus an improper obtaining of the money.

If the parties will not admit that the signature is a signature feigned or forged by Mills, I think that the defendant Leslie may file an affidavit by Cornelius Ryan stating, if it be the fact, as it appears to have been, that he was the only person of that name in the city at that time,

and that he does not know any other person with a similar name residing in or near Toronto. But apart from such an affidavit, I feel justified in finding the facts as above stated.

Judgment.

Rose, J.

There was another ground of appeal taken which was not pressed.

As the appeal has succeeded in part and failed in part, there should be no costs. The certificate will be reduced by the sum of \$200.

G. A. B.

[DIVISIONAL COURT.]

DORSEY ET AL. V. DORSEY.

Husband and Wife—Separate Estate of Wife—Husband's Interest in—Renunciation—Rights of Administrator of Wife's Estate—Evidence of Renunciation—Construction of Document.

A husband is beneficially entitled to a share in the personal property of his wife, on her decease, because of his marital relationship and right; and in the same way to a share in her land, by virtue of R. S. O. ch. 127, sec. 5. If he renounces this marital right before marriage and in order to it, the law cannot replace him in the benefit out of which he has contracted himself.

And where the husband has so renounced, he is not entitled to administration of his wife's estate, for administration follows interest.

The administrator of the wife's estate has a status to set up the husband's renunciation in answer to a claim made by him to a share in the estate.

The husband, before marriage, signed a writing as follows:—"This is to certify that I, H. D., through marriage to A. E. T., will not assert any right or claim to the property of the said A. E. T., either real estate, cash in bank, household or personal effects:"—

Held, that this was to be read as an abandonment of any right or claim in the property which might accrue to him through his intended marriage and was sufficient to protect her estate from any claim of his, after the separate use of the property, to which she was entitled under the Married Women's Act in force at the date of the marriage, 1894, ceased by her death in 1896.

APPEAL by the plaintiffs from the judgment of BOYD, C., reported 29 O. R. 475, where the facts are fully stated, argued on the 9th of September, 1898, before a Divisional Court composed of MEREDITH, C.J., ROSE and MACMAHON, JJ.

Statement.

W. H. Irving, for the appeal, argued that the agreement was only operative during the life of the wife and could not be enforced by any one but her, and at her death the

Argument. husband would take his share of her estate as provided by law under the Statute of Distributions; and if the daughter undertook administration she must so distribute, and cited *Slatter v. Slatter* (1834), 1 Y. & C. (Ex.) 28; *Tayleur v. Dickenson* (1826), 1 Russ. 521; *Attorney-General v. Jacobs Smith*, [1895] 2 Q. B. 341; *Mackie v. Herbertson* (1884), 9 App. Cas. 303; *Newstead v. Searles* (1737), 1 Atk. 265; *Gale v. Gale* (1877), 6 Ch. D. 144.

C. A. Ghent, contra, contended that the marriage took place on the faith of the agreement; that it answered all the requirements of and was sufficient under the Statute of Frauds, and shewed an intention on the part of the husband to make no claim; both parties being competent to contract he had contracted himself out of any share coming to him under sec. 5 of the Devolution of Estates Act, R. S. O. ch. 127; that it was intended to be effective after her death, as she had complete control of her property without it during her life, under the Married Woman's Property Act, R. S. O. ch. 163; and that her administrator had the right to enforce it: *Surman v. Wharton*, [1891] 1 Q. B. 491.

January 7th, 1899. ROSE, J. :—

I agree to the conclusion reached by the learned Chancellor and for the reasons given by him. I cannot usefully add anything to what he has said.

The motion must, in my opinion, be dismissed with costs.

MEREDITH, C. J. :—

I agree in the result, and think that if the writing is not sufficient in form it should on the uncontradicted evidence be reformed so as to effectuate the intention of the parties.

MACMAHON, J. :—

In this I agree.

[DIVISIONAL COURT.]

RE CANADIAN NIAGARA POWER COMPANY.

Contract—Construction—Dependent or Independent Covenants—License—Forfeiture.

To determine whether covenants or agreements are dependent or independent, they are to be construed according to the intent and meaning of the parties, to be collected from the instrument, and to the circumstances legally admissible in evidence with reference to which it is to be construed. Where a covenant or agreement goes to part of the consideration on both sides, and may be compensated in damages, it is an independent covenant or contract.

An agreement made between the commissioners for the Queen Victoria Niagara Falls Park (with the approval of the Government of the Province of Ontario) and the company, by which the latter were granted a license for twenty years (with provision for renewal), at a fixed rental, to take water from the Niagara river for the purpose of generating and developing electricity for transmission beyond the park, contained a provision (4) for re-entry on default of payment of rent, a provision (9) that the commissioners should not grant the same right to others during the company's term, nor themselves use the water for the same purpose, and also contained the two following c'auses.

"10. The company undertake to begin the works * * * on or before the 1st of May, 1897; and to have proceeded so far * * * on or before the 1st of November, 1898, that they will have completed water connections for the development of 25,000 horse power, and have actually ready for use, supply, and transmission 10,000 developed horse power by the said last mentioned day."

"13. If the company should at any time or times continuously neglect for the space of one year effectually to generate electricity or pneumatic power, as hereby agreed by the company, unless hindered by unavoidable accident, the Lieutenant-Governor in Council may then and from thenceforth declare this agreement, the liberties, licenses, powers, and authorities thereby granted, and every one of them, to be forfeited, and thenceforth the same shall cease and determine and be utterly void and of no effect whatever."

The company, although they began the works by the time limited, failed to proceed with them on or before the 1st November, 1898, so as to comply with paragraph 10, not having been hindered by unavoidable accident:—

Held, that the agreement was not, by reason of such failure, determined void, and of no effect, nor could it be so declared by the park commissioners.

2. That the Lieutenant-Governor in Council, or the commissioners, could not, by reason of the non-generation of electricity by the 1st November, 1898, or by reason of the failure of the company to proceed, declare the agreement forfeited.

3. That the Government and the commissioners were not relieved from the agreement contained in paragraph 9.

Per MEREDITH, C.J.—Paragraph 10 is to be treated as a promise or covenant, and not as a condition, (1) because of its form; (2) because the stipulation does not go to the root of the consideration, and is therefore a subsidiary promise rather than a vital one; (3) because the agreement contained an express provision for forfeiture, in certain events—paragraph 13.

And *semble*, that a breach of the undertaking in paragraph 10 is within the provisions of paragraph 13.

Statement. CASE referred by the Lieutenant-Governor in Council for the opinion of the High Court of Justice, pursuant to R. S. O. ch. 84.

An agreement was made on the 7th April, 1892, between the Commissioners for the Queen Victoria Niagara Falls Park, acting therein on their own behalf and with the approval of the Government of the Province of Ontario, of the first part, and the above named company, of the second part, which was ratified and confirmed by 55 Vict. ch. 8 (O.).

The material parts of the agreement were as follows:—

Recital that “the company have applied to the commissioners for the right to take water from the Niagara river at a certain point or points in the park, in order that the company may thereby generate and develop electricity and pneumatic power for transmission beyond the park.”

“(1) For the purpose of generating electricity and pneumatic power to be transmitted to places beyond the park, the commissioners hereby grant to the company a license irrevocable, save as hereinafter limited, to take water from the Niagara river.”

“(4) The license hereby granted is for the term of twenty years, commencing with the 1st day of May, 1892, the company paying therefor at the clear yearly rental of \$25,000 during the first ten years (the rent to be computed from the 1st day of November, 1892) * *. The rental of the second ten years of the term * * shall be as follows: the eleventh year, \$26,000, the twelfth year, \$27,000,” and so on, increasing at the rate of \$1,000 a year up to \$35,000. “Provided always, that if any part of the said rent, whether payable under this paragraph or in respect of the renewal term or terms in the following paragraph, shall be in arrears for three months, whether legally demanded or not, the commissioners, or if not then an existing corporation, the Government of the Province of Ontario, may re-enter on the premises, or any part thereof in the name of the whole, and thereupon this agreement shall determine, and the remainder of the term

then current shall terminate as well as any renewal or renewals thereof which under this agreement may be claimed." Statement.

"(5) If at the end of the said period of twenty years the company desire to renew for a further period of twenty years and shall give notice in writing to the commissioners, * * they shall be entitled to and shall receive a further lease * *."

"(9) The commissioners shall not grant or confer upon any other company or person any right to take or use the waters of the Niagara river within the limits of the park so long as this agreement is in force, nor will the commissioners themselves engage in making use of the water to generate electric or pneumatic power except for the purposes of the park, saving always in so far as regards the exceptions contained in paragraph 12 of this agreement."

"(10) The company undertake to begin the works hereby licensed to be constructed by them on or before the 1st of May, 1897; and to have proceeded so far with the said works on or before the 1st of November, 1898, that they will have completed water connections for the development of 25,000 horse power, and have actually ready for use, supply, and transmission 10,000 developed horse power, by the said last mentioned day."

"(11) The company whenever required shall from the electricity or pneumatic power generated under this agreement supply the same in Canada (to the extent of any quantity not less than one-half the quantity generated) at prices not to exceed the prices charged to cities and consumers in the United States at similar distances from the Falls of Niagara for equal amounts of power and for similar uses, and shall whenever required by the Lieutenant-Governor in Council make a return of prices charged for such electricity or power, verified under oath by any chief officer of the company, and if any question or dispute arises involving the non-supply or prices of electricity or power for consumption in Canada, the High Court of Justice for Ontario shall have jurisdiction to hear

Statement. and determine the same and enforce the facilities to be given or the prices to be charged."

"(12) The company may agree with the Electric Railway Company for the supply of electricity to work the said railway and also supply electricity for any other purpose within the park."

"(13) If the company should at any time or times continuously neglect for the space of one year effectually to generate electricity or pneumatic power as hereby agreed by the company, unless hindered by unavoidable accident, the Lieutenant-Governor in Council may then and from thenceforth declare this agreement, the liberties, licenses, powers, and authorities thereby granted, and every one of them, to be forfeited, and thenceforth the same shall cease and determine and be utterly void and of no effect whatever."

The reference copied the 10th clause of the agreement, and then stated :

"That the commissioners on the 23rd April, 1897, informed the Canadian Niagara Power Company that an application made by the company to them for an extension of time to commence their work and have 10,000 horse power completed ready for use, supply, and transmission (as by the agreement provided), on 1st May, 1900, had been considered, but that the approval of such application for an extension of time was not practicable, and later the company was reminded that the foregoing conclusion, communicated on the said 23rd April, stood on record as the determination of the Government, and that the company knew that before entering into any contracts, the Government felt bound to hold the company to the terms of the agreement. * *

"That the said company had not proceeded with the said works on or before the said 1st day of November, 1898, so as to have, and had not, by the said last mentioned day, completed water connections for the development of 25,000 horse power, and had not then actually ready for supply and transmission 10,000 developed horse

power, as by the said paragraph 10 is required and Statement. provided ;" etc.

The questions submitted were the following :—

" 1. Is the agreement above mentioned determined, void, and of no effect, or can it be so declared by the park commissioners, one of the parties thereto, by reason of the failure of the company to so far have proceeded with the said works by the 1st day of November, 1898, as to have completed water connections for the development of 25,000 horse power, and to have actually ready for use, supply, and transmission 10,000 developed horse power, as by paragraph 10 of the said agreement is required, the company not having been hindered by unavoidable accident ?

" 2. May the Lieutenant-Governor in Council, or the park commissioners, by reason of the non-generation of electricity or pneumatic power, as in the previous question stated, by the 1st day of November, 1898, as provided by paragraph 10 of the said agreement, or otherwise by the said act or agreement, or by reason of the failure of the company to so far have proceeded with the said works by the 1st day of November, 1898, as to have completed water connections for the development of 25,000 horse power, and to have actually ready for use, supply, and transmission 10,000 developed horse power, as by paragraph 10 of the said agreement is required, the company not having been hindered by unavoidable accident, declare the agreement, liberties, licenses, powers, and authorities thereby granted, and every of them, to be forfeited, so that thenceforth the same shall cease and determine and be utterly void and of no effect whatever ?

" 3. If the whole agreement be not at an end, or if the same cannot be declared wholly at an end, are the Government and the commissioners, under the circumstances stated, relieved from the agreement not to grant or confer upon any other company or person the right to take or use the waters of the Niagara river, contained in paragraph 9 of the said agreement ?"

Argument.

The case was heard by a Divisional Court composed of MEREDITH, C. J., ROSE and MACMAHON, JJ., on the 5th December, 1898.

Irving, Q.C., for the Crown and the commissioners. The undertaking contained in paragraph 10 is a condition, vital and precedent. The non-performance of it goes to the root of the contract. The effect has to be gathered from all the terms of the contract, and the intention of the parties is to be collected therefrom: *Gladholm v. Hays* (1841), 2 M. & G. 257, 262. Time is of the essence, even though it be not so expressed: *Ewing v. Good and the Attorney-General* (1839), 1 O. S. 65; *Crossfield v. Gould* (1883), 9 A. R. 218, 234; *Oldfield v. Dickson* (1889), 18 O. R. 188.

Lash, Q.C., on the same side. No term passed by the instrument; it is a mere license, and it ceases if its conditions are not complied with: *Seymour v. Lynch* (1885), 7 O. R. 471, 14 A. R. 738, 15 S. C. R. 341. The license is to do certain things at the time and in the manner prescribed. If, however, this is not a condition, but a covenant, it is a covenant which goes to the root of the matter, and failure to perform it discharges the other party from the performance of his part of the contract: *Behn v. Burness* (1863), 3 B. & S. 751, 759; *Bettini v. Gye* (1876), 1 Q. B. D. 183.

Wallace Nesbitt, for the company. No power of revocation is reserved, and there is no power to forfeit unless it is an exclusive license: *Thicknesse v. Lancaster Canal Co.* (1838), 4 M. & W. 472; *Guyot v. Thomson*, [1894] 3 Ch. 388; *Crawley v. Price* (1875), L. R. 10 Q. B. 302; *Bentsen v. Taylor*, [1893] 2 Q. B. 274; Anson on Contracts, 7th ed., p. 207.

Monro Grier, on the same side, cited *Doe dem. Wilson v. Phillips* (1824), 2 Bing. 13; *Doe dem. Henniker v. Watt* (1828), 8 B. & C. 308; Woodfall on Landlord and Tenant, 15th ed., p. 329.

Lash, in reply.

January 10, 1899. MEREDITH, C.J.:—

Judgment.

Meredith,
C.J.

Whether the agreement between the commissioners and the company, on the provisions of which have arisen the questions submitted for the opinion of the Court, be a lease or license, I am of opinion that the contention of the Crown and the commissioners put forward on the argument is not entitled to prevail.

There has doubtless been a default on the part of the company in carrying out the stipulations contained in paragraph 10 of the agreement, for, although the company began the works on the 1st May, 1897, they had not on or before the 1st November, 1898, made that progress which they undertook to make by that time, and the contention of the Crown and the commissioners is that because of this default the rights of the company are at an end, or, at the option of the commissioners, may be put an end to.

In support of this view it was argued that upon the true construction of the agreement the right of the company to exercise the powers which were thereby granted is conditional upon the strict performance in its entirety of the undertaking contained in paragraph 10, and that none of those rights could be exercised after the 1st November, 1898, unless all that the company undertook to do by that date had then been done; in other words, either that the right of the company to exercise the powers granted by the agreement, *ipso facto*, came to an end on the happening of default, or that, treating the undertaking as a condition, the commissioners were, if they so elected, discharged from their obligations under the agreement by reason of the default.

I am unable to so construe the agreement.

The general rule for determining whether covenants or agreements are dependent or independent is well settled.

It is stated by Baron Parke in *Graves v. Legg* (1854), 9 Ex. at p. 716, that they are to be construed "according to the intent and meaning of the parties to be collected from the instrument, and of course to the circumstances

Judgment. legally admissible in evidence with reference to which it is to be construed." This statement of the law is recognized and adopted in *Bettini v. Gye* (1876), 1 Q. B. D. 183, by Mr. Justice Blackburn, who at p. 188 says: "And in the absence of such an express declaration, we think that we are to look to the whole contract, and applying the rule stated by Parke, B., to be acknowledged, see whether the particular stipulation goes to the root of the matter, so that a failure to perform it would render the performance of the rest of the contract a thing different in substance from what the defendant had stipulated for; or whether it merely partially affects it and may be compensated for in damages. Accordingly, as it is one or the other, we think it must be taken to be or not to be intended to be a condition precedent."

**Meredith,
C.J.**

It is, however, also well settled, and Baron Parke, in the case already referred to (p. 716), speaks of it as a "particular rule well acknowledged," that "where a covenant or agreement goes to part of the consideration on both sides, and may be compensated in damages, it is an independent covenant or contract."

This "particular rule" was recognized and acted on in *Gladholm v. Hays* (1841), 2 M. & G. 257; and in referring to the cases which establish it, or in which it was acted on, Chief Justice Tindal distinguishes them from that case. He says at p. 268: "The present case appears to us to be distinguishable from those cited on the part of the plaintiff, in both the particulars to which we have adverted; viz., that in this case the form of the stipulation is more nearly in the language of condition than in that of agreement, whilst in the cases cited the stipulation is in the language of covenant only; and again, that in this case the performance of the stipulation goes more to the very root and the whole consideration of the contract. And, indeed, in most or all of those cases, the objection had not been taken until after the voyage had been performed, nor, in many cases, until after the goods had been accepted; so that, it is manifest, the breach of the agreement of which the defen-

dant complained, and which he sought to set up as the non-performance of a condition precedent, could not go to the whole of the consideration of the contract."

Judgment.
Meredith,
C.J.

The question is very fully discussed by Mr. Anson in his work on Contracts, 7th ed., pt. 5, ch. 3, commencing at p. 287, where the authorities are collected and the result of them is stated.

He treats at p. 300 *et seq.* of promises which admit of more or less complete performance, where default is made on one side, and says, at p. 304, with regard to such promises: "The Courts must determine whether or no that default amounts to a renunciation of the contract by the party making it, or so frustrates the objects of the contract as to discharge the party injured from his liabilities:" and he then proceeds to consider the case of contracts made up of various statements and promises on both sides, differing in character and importance, and adds: "And the parties may regard some of these as vital, others as only subsidiary, or collateral to the main purpose of the contract. Where one of these is broken the Court must discover, from the tenour of the contract or the expressed intention of the parties, whether the broken term was vital or not."

Reference may also be made to the notes to 1 Wms. Saunders, ed. 1871, p. 552, rule 3.

It is unnecessary, I think, to refer to any other of the numerous cases which were cited on the argument, as they do but illustrate or apply the rules of construction to which I have referred.

I have arrived at a conclusion adverse to the contention of counsel for the Crown and the commissioners, for the following reasons:

1. The parties have by their agreement put the stipulation contained in paragraph 10 in the form of a promise or covenant, and not in that of a condition.

This fact is, of course, not conclusive, but it is a circumstance to be considered in determining as to the nature and effect of the stipulation: *Gladholm v. Hays* (1841), 2 M. & G. at p. 268.

Judgment.
Meredith,
C.J.

2. The stipulation does not go to the root of the consideration, and is, therefore, I think, to be treated as a subsidiary promise, rather than as a vital one.

Looking at the terms of the agreement as they are to be viewed, as stated by Baron Parke, I find nothing to indicate that the main purpose of it was the generating of electricity and pneumatic power in order to utilize the undeveloped power of the Niagara river, in the interest and for the benefit of the commissioners or the public, but rather that what brought the agreement into being was the desire of the promoters of the company to embark in a commercial enterprise for the purpose of gain to themselves, for the accomplishment of which it was necessary to obtain from the commissioners the rights which the agreement confers, and for which the company were willing to pay the annual compensation ultimately agreed on. This is, I think, manifest from the recitals which, as far as they are material to the present inquiry, are as follows :

“And whereas the company have applied to the commissioners for the right to take water from the Niagara river at a certain point or points in the park, in order that the company may thereby generate and develop electricity and pneumatic power for transmission beyond the park.

“And whereas it is the intention of the company to apply to the Legislature of Ontario at its present session for a charter of incorporation to enable them, and such others as may be associated with them in the undertaking, to construct and operate the said works hereinafter defined.

“And whereas the company desire to secure the right to construct their works in the park, and the commissioners have agreed to permit such construction, upon the terms and for the considerations hereinafter expressed and contained, or intended so to be.”

The opening words of paragraph 1 were appealed to as indicating that the development of the power was the primary purpose of the commissioners, but I do not so understand them. They seem to me to have been intended

only for the purpose of limiting the objects for which the rights granted might be exercised, and to prevent them being used for any other purpose than that of generating electricity and pneumatic power to be transmitted to places beyond the park. The stipulations of the 10th paragraph and those dealing with the supply of power in Canada, though, no doubt, important ones, were, I think, as I have already said, subsidiary to the main purpose of the agreement.

Judgment.
Meredith,
C.J.

The development of the power and the supplying of the product of that development in Canada were certainly not the sole, nor were they, as I think, the main, consideration for the grant of the rights which were conferred upon the company. In my view, the not inconsiderable annual rent, as it is termed, was the main consideration from the point of view of the commissioners, and the other considerations were, in my opinion, only subsidiary.

If the company, having failed in the performance of the undertaking in paragraph 10, should lie by and evince an intention to do nothing to develop the power as they have contracted to do, such a state of circumstances might be held to exist as would justify a finding that the company had abandoned its right to exercise the powers granted by the agreement; but no such condition of things exists in this case, for the company has begun the work, and not only has not evinced an intention to abandon its rights, but strongly insists on maintaining those rights, and as strongly avows that its intention is to proceed with the completion of the works stipulated for, if permitted to do so.

It has been held in several of the United States of America that where the sole consideration for a mining lease or the grant of an exclusive right to mine for a term of years is the rendering to the lessor or grantor of a royalty on or part of the product of the mine, there is an implied covenant to work the mine, the breach of which works a forfeiture of the rights of the lessee or grantee; a reasonable time is, in the absence of an express stipulation,

Judgment. the period within which the working is to begin; and it
Meredith, would follow that where there is an express stipulation as
C.J. to time, failure for that period would have the same effect.

These cases are, as it appears to me, if it be right to imply the covenant, within the rule with which I am dealing, if it be applicable to such a lease or grant, because the implied covenant goes to the very root of the contract and the whole consideration for the promise of the lessor or grantor, but the decisions do not seem to have proceeded entirely upon that ground, but rather upon the theory that there was also to be implied a right of re-entry to the lessor or grantor for breach of the implied covenant.

The cases are collected in Barringer & Adams on the Law of Mines and Mining in the United States, and I refer particularly to *Conrad v. Morehead* (1883), 89 N. Car. 31, and *Oliver v. Goetz* (1894), 125 Missouri 370.

3. The agreement contains an express provision for the forfeiture in certain events of the company's rights.

Paragraph 13: "If the company should at any time or times continuously neglect for the space of one year effectually to generate electricity or pneumatic power as hereby agreed by the company, unless hindered by unavoidable accident, the Lieutenant-Governor in Council may then and from thenceforth declare this agreement, the liberties, licenses, powers, and authorities thereby granted, and every one of them, to be forfeited, and thenceforth the same shall cease and determine and be utterly void and of no effect whatever."

Whether or not this provision extends to a breach of the company's undertaking in paragraph 10, which may be open to question, the insertion of it in the agreement affords, I think, an argument against the contention of the Crown and the commissioners.

If the breach be covered by paragraph 13, then it is conceded that that contention must fail; but if it be not, the presence of the provision shews that the contracting parties had in mind the difference between stipulations the breach of which should entitle the grantors to put an end to the

agreement, and those the breach of which should not be followed by that consequence.

Judgment.

Meredith,
C.J.

They have provided that in case of failure to pay the agreed rent there shall be a right of re-entry, and that for the default with which paragraph 13 deals there shall be a right in the grantors to forfeit. This affords a strong argument that it was not intended that such serious results should flow from a breach of the company's other undertakings or agreements.

It is, I think, highly improbable that it was intended that failure to complete the works mentioned in paragraph 10 by the day named for their completion, though on that day they should be almost completed, or that the failure, it might be, to complete the water connections to the extent of 1,000 of the 25,000 horse power, though everything else stipulated for might have been done, should subject the company to the risk of having their rights put an end to, and of losing not only what I may speak of as a probably "valuable franchise," but also the moneys expended on the works: and yet all this might happen, and that, too, though performance had been hindered by unavoidable accident. My view is, I think, strengthened by the language of paragraph 13, which excludes from the computation of the time mentioned in it delays due to hindrance from unavoidable accident. It is difficult for me to understand why, if, as contended, paragraph 13 does not extend to a breach of the undertaking in paragraph 10, there should be the exception as to such delays as to the matters dealt with by paragraph 13, but no exception of a like kind with regard to delays, at least as likely to happen, as to the matters dealt with in paragraph 10.

I am inclined to think that a breach of the undertaking in paragraph 10 is within the provisions of paragraph 13, though it is not necessary to express a decided opinion upon the point.

The neglect dealt with is a neglect effectually to generate electricity or pneumatic power, "as hereby agreed by the company," and an agreement to do that, is nowhere to be found in the agreement, unless it be in paragraph 10.

Judgment.
Meredith,
C.J.

The other line of argument of counsel for the Crown and the commissioners is also, in my opinion, not sustainable.

We were asked to read the agreement as if it granted the right to enter on or before, but not after, the 1st May, 1897, and as if the right to do the work necessary for the purposes of the company, as far as the company undertook to do that work by the 1st November, 1898, was in terms a right to do it on or before that day, but not after; but it is, I think, impossible to do so. The grant is in terms irrevocable "save as hereinafter limited," and by paragraph 4 it is for a term of twenty years, to be reckoned from the 1st May, 1892, with the right of renewal for four additional terms of twenty years—provisions which seem to me quite inconsistent with such a construction of the agreement as is contended for.

I have dealt with the case as if the rule invoked by the Crown and the commissioners for the determination of the rights of the parties were applicable to such an instrument as the agreement with which we are dealing. That it is applicable may well be open to question. It is not an ordinary contract containing merely stipulations on the part of the respective contracting parties, but more than that, even if it be a grant of a license only, and not a lease. It is the grant of an incorporeal right or hereditament, and it is difficult to see how that interest could be divested unless by force of some condition to that effect contained in the instrument, or a right of re-entry reserved by it to the grantors.

With regard to the third question, I may add that upon the argument no principle was suggested, and I am not able to discover any, upon which the default of the company can be held to have relieved the Government and the commissioners from the agreement not to grant or confer upon any other company or person the right to take or use the waters of the Niagara river contained in paragraph 9 of the agreement: until the company's rights under the agreement have come to an end by effluxion of time, or

have been determined in accordance with its terms, all the provisions of the agreement are, in my opinion, binding on the parties to it.

Judgment.

Meredith,
C.J.

The questions referred to the Court by His Honour the Lieutenant-Governor in Council, and each of them, should, in my opinion, be answered in the negative.

ROSE, J.:—

In my opinion, clause 13 applies equally to neglect to generate electricity or pneumatic power, whether by reason of neglect to construct works or to complete water connections, or to take any other steps necessary to have developed horse power ready by the day named, as to neglect to generate after construction of the works and the completion of the connections, although all that had been done by the day named. The company agreed as appears in the 10th paragraph, and for breach an action would lie and a power to forfeit arise, just as, in case of non-payment of rent, an action would lie under paragraph 13, and the power to re-enter and determine arise under paragraph 4.

The commissioners desired to secure two things, payment of rent and generating of electricity and pneumatic power, and provided similar modes of enforcing the agreement as to both and to determine the agreement, if necessary, to get rid of the company if it neglected to pay the rent or generate electricity or pneumatic power. Exactly the nature of the default which, under clause 10, would give rise to the right to forfeit under clause 13, it is not necessary, for the purpose of answering the questions submitted to us, to determine. When the year has expired, if default should continue, the parties will, no doubt, be advised as to their respective rights. If the parties have expressly provided for terminating the agreement only after default for a year, it is manifest that it was not intended that non-performance by the day named, *i.e.*, at the beginning of the year, should work a forfeiture of all the company's rights under the agreement, involving

Judgment.

Rose, J.

the loss of all its property and money expended, and constitute it a trespasser on the land entered upon.

I have endeavoured to arrive at the meaning of the instrument, and thus the intention of the parties, without classifying the instrument as either a license or lease, and annexing to it the incidents of either or both, for while the parties have called it an "agreement" and a "license," they also have included provisions which would be proper in a lease. In my opinion, it is neither strictly a license nor a lease; but has incidents appertaining to both; and read simply as the parties seem to me to have understood it, I have reached the result stated.

I would answer the questions in the negative; one and two, for the reasons above given; three, for the reasons stated by the Chief Justice.

MACMAHON, J. (after stating the facts as above):—

Although the agreement was entered into in April, 1892, by its terms it was contemplated that the works provided for therein might not begin until May, 1897, so that, during the interval, the company were paying the large rental mentioned in the 4th clause of the agreement. This must have proved a very substantial—if not the principal—inducement to the commissioners to enter into the agreement. There is in that clause a proviso for re-entry and forfeiture for non-payment of the rent.

The work was commenced within the prescribed time, but the company had not completed water connections for the development of 25,000 horse power, nor had it ready for use, supply, and transmission 10,000 developed horse power, as covenanted for in the 10th clause.

The "power" which is to be ready for use, supply, and transmission is, as appears by the recital and first clause,—shewing the objects for which the agreement was being entered into—"electricity and pneumatic power to be transmitted beyond the park," etc. As this was the power the company was licensed to generate and transmit, we

know that the completed water connection for the development of 25,000 horse power means a water connection which, when its force is applied to a wheel to which the necessary machinery is connected, is capable of developing electric or pneumatic power to the extent named. And by the same date (1st November, 1898) the company covenanted to have actually ready for transmission electrical or pneumatic power equal to 10,000 horse power.

Judgment.
MacMahon,
J.

Then for a breach of the covenant in clause 10, are the park commissioners entitled to have it declared that the power company has forfeited its rights under the agreement?

Mr. Irving contended that the performance by the company of the undertaking in clause 10 is a condition precedent for non-compliance with which a forfeiture was created, and that clause 13 has no application to clause 10.

“Stipulations in a contract as to something future to be done often constitute conditions precedent to be performed by one party before any liability attaches to the other. Whether particular stipulations are to be conditions precedent or not depends upon the intention of the parties, to be gathered from the language of the particular instrument.” Addison on Contracts, 9th ed., p. 51; *Havelock v. Geddes* (1809), 10 East 555. And the Supreme Court of Massachusetts in *Schwoerer v. Boylston Market Ass'n.* (1868), 99 Mass. 285, said (p. 298):—“Provided that” and “provided also” do not always constitute a condition, and the question whether there be a condition, as well as whether it be precedent or subsequent, is to be determined by ascertaining the intention of the parties from the whole language used, and the nature of the act required. When for the purpose of its fulfilment it implies that the grantee is to have possession and control of the premises, it is ordinarily construed to be a condition subsequent.”

No matter what may be the exact legal effect of clause 13, the very fact of its presence in the agreement sufficiently indicates that the undertaking or covenant of the company

Judgment.
MacMahon,
J.

in the 10th clause was not to be regarded as a condition precedent. For, in certain events therein referred to, an extension of time for a year is absolutely provided for; and if hindered through unavoidable accident in completing the works at the end of such year the company is entitled to a further extension.

There is an express proviso for the right to re-enter for non-payment of rent. And had it been intended that there was to be a right of re-entry and forfeiture for a breach of the covenant in clause 10, it is not unnatural to suppose that an express proviso to that effect would have been inserted by the draughtsman. On this point I would refer to an extract from the judgment of Lord Eldon in *Church v. Broun* (1808), 15 Ves. 258, which is quoted with approval by Lord Justice James in *Hodgkinson v. Crowe* (1875), L. R. 10 Ch. at p. 625, which is as follows:—"The safest rule for property is, that a person shall be taken to grant the interest in an estate, which he proposes to convey, or the lease he proposes to make; and that nothing, which flows out of that interest, as an incident, is to be done away by loose expressions, to be construed by facts more loose; that it is upon the party, who has forborne to insert a covenant for his own benefit, to shew a title to it; and that it is safer to require the lessor to protect himself by express stipulation, than for courts of equity to hold, that contracting parties shall insert, not restraints, expressed by the contract, or implied by law, but such, more or less in number, as individual conveyancers shall from day to day prescribe, as proper to be imposed upon the lessee; and that, all those restraints, so imposed from time to time, are to be introduced, as the aggregate of the agreement."

As I have already pointed out, the "power" which the company is licensed to generate is electrical and pneumatic, and therefore that is the only "power" to which the 10th clause can refer. And my present opinion is that clause 13 must be regarded as applying equally to the completion under clause 10 of the water connection for the develop-

ment of the 25,000 horse power, as to the 10,000 which was to be ready for use and transmission.

In considering the question (which may after all be of no practical utility) as to whether the agreement constitutes a lease, or a mere license, the right to the exclusive possession of the land mentioned in clause 1, and the right to erect buildings and power houses thereon, give it the incidents of a lease; while other provisions therein partake of the character of licenses. It has provisions applicable to both a lease and a license. But designating the instrument as being either the one or the other, alters not its legal effect. The judgment of Sir Adam Wilson in *Seymour v. Lynch* (1885), 7 O. R. 471, is instructive as to instruments of the character we are considering here.

I agree that all the questions submitted must be answered in the negative.

E. B. B.

Judgment.
MacMahon,
J.

[DIVISIONAL COURT.]

HOWELL LITHOGRAPHIC COMPANY (LIMITED) V.
BRETHOUR ET AL.

*Company — Corporate Name — “Limited” — Abbreviation in Contract —
Liability of Directors — Right of Action — Vested Right — Statutes —
“Stay” Clause — Retroactivity.*

A bill of exchange drawn by the plaintiffs upon the Burford Canning Company (Limited) was addressed to “The Burford Canning Co.,” and accepted by the drawees by the signature “The Burford Canning Co., Ltd.” This was a few days after the royal assent had been given to the Ontario Act 60 Vict. ch. 28, sec. 22 of which provided that in the case of contracts by limited liability companies the word “limited” should be written or printed in full, a previous statute, 52 Vict. ch. 26, sec. 2, having made the directors liable for the amounts due upon such contracts where the word “limited” did not appear after the name of the company where it first occurred in the contract. The writ of summons in this action (against the directors) was issued on the very day on which the royal assent was given to the Act 61 Vict. ch. 19, sec. 4 of which suspended the operation of the Act of the previous session :—

Held, that the use of the abbreviation “Ltd.” was not a compliance with 52 Vict. ch. 26, sec. 2.

Held, also, that the address to the “Burford Canning Co.” in the draft was the first place in which the name of the company appeared in the contract, but that the fact of its having been so written there by the plaintiffs did not disentitle them to recover.

Held, also, that no stay was created by 61 Vict. ch. 19, sec. 4, of any action but one brought under 60 Vict. ch. 28, sec. 22 (1), and the corresponding section of the revision of 1897, so that, upon this view of the effect of 52 Vict. ch. 26, sec. 2, the plaintiffs were entitled to recover.

If, however, the use of the contraction “Ltd.” was a compliance with the last mentioned section, the plaintiffs were still entitled to recover, because the contract was made some days after the passing of 60 Vict. ch. 28, sec. 22, which required the unabbreviated word “limited” to be used; and the plaintiffs, upon the execution of the contract by the Burford Canning Company (Limited) became and remained entitled to look to the directors personally, and had a vested right of action, with which the “stay” clause, sec. 4 of 61 Vict. ch. 19, could not interfere, there being nothing in it which required the Court to hold it to be retrospective.

Statement.

AN appeal by the defendants from the judgment of the County Court of the county of Wentworth in favour of the plaintiffs.

The plaintiffs were an incorporated company carrying on business at Hamilton, in this Province; the defendants were the directors of a joint stock company called “The Burford Canning Company (Limited),” incorporated under

the Ontario Joint Stock Companies Letters Patent Act Statement.
(R. S. O. 1887 ch. 157), subsequent to the 23rd March, 1889, and before the 13th April, 1897.

On the 20th April, 1897, the plaintiffs drew a draft for a debt due by "The Burford Canning Company (Limited)" to them, in the following words and figures:—

"Hamilton Ont. April 20th 1897.

One month after date pay to the order of the Bank of Hamilton at _____ one hundred and fifty two $\frac{30}{100}$ dollars value received and charge to a/c of

(Sd.)	THE HOWELL LITHOGRAPHIC
Burford Canning Co. }	Co. LIMITED
Burford Ont. }	F. J. HOWELL President."

Upon this being presented at the office of "The Burford Canning Company (Limited)," an acceptance was written across its face by J. C. Brethour, one of the defendants, in the following words:—"Accepted, May 11th, 1897, payable at the Standard Bank of Canada, Brantford. The Burford Canning Company, Ltd., per J. C. Brethour, Managing Director."

This acceptance was not paid at maturity, and still remained unpaid at the time this action was brought, and the Burford Canning Company (Limited), on the 1st January, 1898, made an assignment for the benefit of their creditors.

This action was brought on the 17th January, 1898, against the directors of "The Burford Canning Company (Limited)," seeking to recover from them personally the amount of the acceptance above set out, upon the ground that they had not added the word "limited" to the name of the company upon the face of the contract, as required by 52 Vict. ch. 26, sec. 2 (O.), and 60 Vict. ch. 28, sec. 22 (O.).

The facts were not disputed, and the Judge of the County Court, before whom the action was tried without a jury, ordered judgment to be entered for the plaintiffs for the amount claimed.

Statement.

The defendants appealed against this judgment, and their appeal was argued before a Divisional Court (ARMOUR, C.J., FALCONBRIDGE and STREET, JJ.), on the 27th January, 1899.

Aylesworth, Q.C., for the defendants.

D'Arcy Tate, for the plaintiffs.

The arguments are fully stated in the judgment. The following cases were referred to:—*Kay v. Goodwin* (1830), 4 Moo. & P. 341; *Union Iron Co. v. Pearce* (1869), 4 Bissell (U. S. Cir. Ct. Ind.) 327; *Andring v. Levy* (1879), 57 Miss. 51, 58; *Cole v. Porteous* (1891), 19 A. R. 111; *Jones v. Paxton* (1892), *ib.* 163; *Gillmore v. Shooter* (1679), 2 Mod. 310; Hardcastle on Statute Law, 2nd ed., pp. 367, 370, 376; Maxwell on Statutes, 2nd ed., p. 257.

February 8, 1899. -The judgment of the Court was delivered by

STREET, J.:—

The Acts referred to upon the argument as having a bearing, or possible bearing, upon the question to be determined were the following:—Sec. 2 of ch. 26 of 52 Vict. (O.), “The directors of every such company” (including companies incorporated under The Ontario Joint Stock Companies Letters Patent Act) “shall be jointly and severally liable upon every written contract or undertaking of the company on the face whereof the word ‘limited’ or the words ‘limited liability’ are not distinctly written or printed after the name of the company where it first occurs in such contract or undertaking.”

This section came into force on 23rd March, 1889.

On 13th April, 1897, The Ontario Companies Act was passed and came into force, being ch. 28 of 60 Vict. By sec. 3 it is enacted that “No company shall hereafter be incorporated under The Ontario Joint Stock Companies Letters Patent Act, being chapter 157 of the Revised Statutes of

Ontario, 1887, and amendments thereto, for which this Act is hereby substituted," etc. Judgment.

Street, J.

And by sec. 4: "The provisions of sections fifteen to one hundred and two, inclusive, shall apply to every company heretofore incorporated by letters patent issued under the authority of an Act of the Legislature of Ontario," etc.

By sub-sec. (1) of sec. 22: "The directors of the company shall be jointly and severally liable upon every written contract or undertaking of the company whereof the *unabbreviated* word 'Limited' is not distinctly written or printed as the last word in the name of the company where it first occurs in such contract or undertaking."

The section last quoted appears in the Revised Statutes of 1897, without alteration, as sub-sec. 2 of sec. 23 of ch. 191.

By 61 Vict. ch. 19, sec. 4, which was assented to on 17th January, 1898, a new sub-section is added to sec. 23 of ch. 191, R. S. O. 1897, as follows:—

"(7) In the case of companies incorporated before the thirteenth day of April, 1897, this section shall not take effect so as to render any such company or the directors or officers thereof liable to the penalties or liabilities hereby imposed by reason of such company using the abbreviation 'Ltd.,' or any other abbreviation of the word 'Limited,' or to companies lawfully incorporated without the word 'Limited' forming part of the name or style thereof, until after the first day of January, 1900; but this shall not relieve any such company from any penalty to which it would have been liable prior to the passing of the Act passed in the 60th year of Her Majesty's reign, chaptered 28."

It is to be observed that by ch. 190, R. S. O. 1897, The Ontario Joint Stock Companies Letters Patent Act, being ch. 157 of the revision of 1887, is treated as not having been repealed, but only superseded by ch. 191, R. S. O. 1897.

The present action was begun by a writ of summons issued on the 17th January, 1898, being the day on which 61 Vict. ch. 19, sec. 4, came into effect.

Judgment.

Street, J.

The argument presented by counsel for the appellant was that the plaintiffs could not recover against the defendants because the plaintiffs themselves, and not the Burford Canning Company (Limited), had used the name of the latter company where it first occurs in the draft, without the addition of the word "Limited:" or, if the signature of the company is to be treated as the first place in which its name occurs in the contract, then that the abbreviation "Ltd." was a compliance with the requirements of 52 Vict. ch. 26, sec. 2, and its use, instead of the full word "Limited," did not render them liable under that section; and that the liability they incurred under 60 Vict. ch. 28, sec. 22, sub-sec. (1), was stayed or taken away by 61 Vict. ch. 19, sec. 4.

I am of opinion that the use of the abbreviation "Ltd." was not a compliance with 52 Vict. ch. 26, sec. 2, which requires the word "Limited" to be distinctly written or printed after the name of the company.

I am further of opinion that the address to the "Burford Canning Co.," in the draft drawn by the plaintiffs, was the first place in which the name of the company appeared in the contract, but that the fact of its having been so written there by the plaintiffs does not disentitle them to recover. If the company chose to execute a contract containing that description of their corporate name, they must be taken to have done so with the knowledge that they were at the same time making the contract personally binding upon their directors. There is no stay created by 61 Vict. ch. 19, sec. 4, of any action but one brought under 60 Vict. ch. 28, sec. 22, sub-sec. (1), and the corresponding section of the revision of 1897, so that, upon this view of the effect of 52 Vict. ch. 26, sec. 2, the plaintiffs are entitled to recover.

If, however, it should be held that the use of the contraction "Ltd." was a compliance with the last mentioned section, I think the plaintiffs are still entitled to recover, for the following reasons:—The contract in question was made some days after the passing of 60 Vict. ch. 28, sec.

22, which requires the unabbreviated word "Limited" to be used, and the plaintiffs, upon the execution of the contract by the Burford Canning Company (Limited), became and remained entitled to look to the directors of that company personally. This was a vested right of action with regard to which the "stay" clause, sec. 4 of ch. 19 of 61 Vict., cannot be held to interfere. There is nothing in that clause which requires us to hold it to be retrospective, and we should not, unless compelled by its terms to do so, so construe it as to interfere with vested rights of action.

Upon either view, therefore, I think that the defendants must be held personally liable for the plaintiffs' claim, and the appeal must be dismissed with costs.

E. B. B.

Judgment.

Street, J.

[DIVISIONAL COURT.]

THE TRUSTS CORPORATION OF ONTARIO

V.

THE CORPORATION OF THE CITY OF TORONTO.

Mistake—Assessment and Taxes—Payment of Current Taxes in Ignorance of Prior Sale for Arrears—Action to Recover.

Land belonging to a trust estate having been sold for taxes, during the year allowed for redemption the trustees who had been newly appointed paid the taxes for the current year in ignorance of the sale, and subsequently on learning the fact decided not to redeem as the arrears exceeded the value of the land:—

Held, that they were not entitled to recover back the money as paid under a mistake of fact.

THIS was an appeal by the plaintiffs from a judgment of His Honour Judge Morgan, Junior Judge of the County Court of the county of York, dismissing the action, which was tried before him without a jury. Statement.

The evidence at the trial shewed the following undisputed facts.

Statement.

A number of parcels of land were the property of the trustees of the marriage settlement of Mrs. Heward. Mr. Robert Gilmor had been the last surviving trustee of this settlement, and upon his death, Mr. Hime, who had acted as his agent, handed over to the plaintiffs a number of papers relating to the trust property, including a list of the lands and certain notices of assessment for taxes upon them.

The plaintiffs were duly appointed trustees under the settlement on January 29th, 1896, and finding a parcel of land lying upon Manning avenue in the city of Toronto in the list of lands belonging to the trust, and receiving a notice of the assessment for 1896 of the same property to the "Heward Estate—Hime, Agent," they paid the taxes for the year 1896 upon the property to the collector for the defendants during August and September, 1896.

The land in question had been sold on March 6th, 1896, by the defendants, for the arrears of taxes accrued prior to the year 1896, but the plaintiffs did not become aware of this fact until January, 1897. Having become aware of it, they did not redeem the land as they might have done, because the arrears far exceeded the value of the land.

This action was brought to recover back from the defendants the taxes paid for the year 1896, and the ground relied upon was that the payment was made under a mistake of fact of a character entitling them to recover the money, the mistake being the absence of any knowledge of the sale in March, 1896.

The learned Judge of the County Court dismissed the action with costs, and the plaintiffs appealed.

The appeal was argued before the Divisional Court (FALCONBRIDGE and STREET, JJ.), on December 14th, 1898.

Aylesworth, Q.C., and George C. Heward, for the plaintiffs, contended that the taxes in question having been paid under a mistake of fact, could be recovered back: *Law Society of Upper Canada v. Corporation of City*

of *Toronto* (1866), 25 U. C. R. 199; *Mayer v. Mayor, etc.*, Argument. of the *City of New York* (1875), 63 N. Y. 455; *Marriot v. Hampton* (1797), 2 Smith L. Cas., 9th ed., at p. 462; and that the treasurer had no right in law to receive the taxes, there being arrears: R. S. O. ch. 224, sec. 162; *Deverill v. Coe* (1886), 11 O. R. 222.

Fullerton, Q.C., for the city of Toronto, contended that the payment here was voluntary and intentional; that there was no ignorance of any material circumstance affecting the liability, and making it no liability; it was the desirability of paying, not the liability, that was considered: Amer. & Eng. Ency. of Law, vol. 18, p. 214; that the demand for the taxes was legal and the taxes owing, nor was the payment made under compulsion: Dillon on Municipal Corporations, 4th ed., secs. 939-42; Cooley on Taxation, 2nd ed., p. 814; *Bain v. City of Montreal* (1883), 8 S. C. R. 252; that there was no such mistake as entitles to the recovery back of the money: Addison on Contracts, 9th ed., pp. 430-1; *Aiken v. Short* (1856), 1 Hurl. & N. 210; *Pollard v. Bank of England* (1871), L. R. 6 Q. B. 623, 631; *Chambers v. Miller* (1862), 13 C. B. N. S. 125; *Gillard v. Wise* (1826), 5 B. & C. 134; *Consumers' Gas Co. v. City of Toronto* (1896), 23 A. R. 551, 558; that the payment was made to the collector, not to the treasurer; and as to *Deverill v. Coe* (1886), 11 O. R. 222, see at p. 224. He also cited *McCarrall v. Watkins* (1861), 19 U. C. R. 248; *Corporation of the City of London v. Watt & Sons* (1893), 19 A. R. 675, 22 S. C. R. 300; and the provisions of the Assessment Act, R. S. O. ch. 224, secs. 146, 148, 150, 161-3.

Aylesworth, in reply, contended that his clients, as trustees, had paid taxes on property which they thought their *cestui que trust* owned, but which in fact the *cestui que trust* did not own; and rested the case on the decision of the point whether the trustees were liable to pay the taxes in law, or were paying a debt which in equity or good conscience they ought to have paid, referring to 55 Vict. ch. 48, sec. 124 (O.).

Judgment. The judgment of the Court was delivered on December
Street, J. 29th, 1899, by

STREET, J. :—

I think it is quite plain that the plaintiffs are not entitled to recover the money claimed in this action.

If any personal obligation to pay was created by the assessment then there would be no doubt that they could not recover, being bound by the assessment.

But they contend, and I think they are quite right in their contention, that no personal liability at all was created by the form of the assessment, and that they never were and never supposed that they or the trust funds in their hands were ever bound as a matter of law by it. It was a matter of discretion on their part whether, taking into consideration the value of the land, it would be desirable in the interest of the trust to pay these taxes.

There never has been any doubt about the right of the defendants to receive the taxes, and to charge them against the land if they should not be voluntarily paid.

The facts which the plaintiffs did not know when they paid the taxes now sought to be recovered were, that the taxes for previous years upon the same land had been suffered to go into arrear, and that in March, 1896, the land had been sold for taxes. It may be conceded without any question that if these facts had been known to the plaintiffs they would not have paid the taxes now in question; but the reason they would not have paid them is not that the defendants would not have been entitled to receive them, but that it would have been unwise from the plaintiffs' standpoint to pay them. If the land had become valuable between January, 1897, when the plaintiffs became aware of all the facts, and March, 1897, when the time for redemption expired, there is no doubt they would have redeemed the land.

The case seems to me to be precisely covered by the decisions in *Aiken v. Short* (1856), 1 H. & N. 210, and

Chambers v. Miller (1862), 13 C. B. N. S. 125. In the former case Bramwell, B., says, at p. 215: "In order to entitle a person to recover back money paid under a mistake of fact, the mistake must be as to a fact which, if true, would make the person paying liable to pay the money; not where, if true, it would merely make it desirable that he should pay the money."

Judgment.

Street, J.

In *Kelly v. Solari* (1841), 9 M. & W. 54, Parke, B., says, at p. 58: "I think that where money is paid to another under the influence of a mistake, that is, upon the supposition that a specific fact is true, which would entitle the other to the money, but which fact is untrue, and the money would not have been paid if it had been known to the payer that the fact was untrue, an action will lie to recover it back, and it is against conscience to retain it."

These definitions are not exhaustive, but they cover, I think, the present case.

In *Durrant v. Ecclesiastical Commissioners* (1880), 6 Q. B. D. 234, which at first sight appears somewhat like the present case, the plaintiff had paid to the defendant certain tithes, believing them to be the tithes upon land which he occupied and upon which he was bound to pay; it appeared, however, that the defendants had included the tithes upon other land which the plaintiff did not occupy and in which he had no interest. The Court held him entitled to recover, upon the ground that he had paid the tithes upon the second parcel under the belief that he was liable to pay them as part of the tithes upon the first parcel.

In my opinion the mistakes of fact under which the plaintiffs were labouring when they paid the taxes in question are not such as to entitle them to recover back the money, and the appeal should be dismissed with costs.

A. H. F. L.

[DIVISIONAL COURT.]

IN RE THE QUEEN V. THE TORONTO RAILWAY
COMPANY.

Municipal Corporations—Offences Against By-Laws—Summons Against Company—Service—R. S. O. ch. 223, secs. 704, 705—Criminal Code, 1892, secs. 562, 853, 858.

Section 705 of the Municipal Act, R. S. O. ch. 223, as to summary prosecution before a justice of the peace for offences against municipal by-laws applies to incorporated companies as well as to individuals, as do also sections 562, 853, and 858 of the Criminal Code, 1892, as to service of summonses.

Decision of ROSE, J., affirmed.

Statement. THIS was an appeal by the defendants, the Toronto Railway Company, from an order of the Honourable Mr. Justice ROSE refusing to grant an order to prohibit the further prosecution herein of the Toronto Railway Company by the corporation of the city of Toronto, before the police magistrate of the city, for an alleged breach of a by-law of the city of Toronto, upon the ground that the company could not by law be punished by summary conviction before a magistrate, but were punishable by indictment only.

The judgment of ROSE, J., in which the provisions of the by-law in question are sufficiently stated and which was delivered on November 17th, 1898, was as follows:—

“ By sec. 569 of the Municipal Act, R. S. O. ch. 223, subsec. 4, councils of cities are empowered to pass by-laws to compel electric railway companies operating within the limits of such city to provide “proper and sufficient and closed vestibules upon street cars,” etc. Under the powers conferred by such section, the city of Toronto on September 24th, 1894, passed a by-law, number 3280, to compel every electric railway company operating within the limits of the city of Toronto to provide such vestibules in the manner provided by such by-law and as therein fully set

forth. By clause 4 of such by-law it is enacted that any company guilty of a breach of the provisions of the by-law shall on conviction forfeit and pay a penalty and costs, to be levied by distress and sale of the goods and chattels of the offender in case of non-payment.

Judgment.

Rose, J.

By section 705 of the Municipal Act, prosecutions for any offence against a municipal by-law may be had before a justice of the peace for the municipality where the offence was committed, and by such section it is provided that the justice may convict, award a penalty with costs, and cause such penalty and costs if not forthwith paid to be levied by distress and sale of the goods of the offender.

Clause 4 of the by-law is drawn under the provisions of such section.

Section 706 of the statute provides for commitment in default of distress.

A summons has been issued against the Toronto Railway Company for an alleged offence against the by-law in question. That summons was served upon the manager and the secretary of the company. The company was incorporated by 55 Vict. ch. 99. O.

The provisions of the Criminal Code, 55-56 Vict. ch. 29, which were treated as in question here, were sections 562, 853, and 858.

Section 562 provides for service of a summons upon the person to whom it is directed, either by delivering it to him personally, or if such person cannot conveniently be met with, by leaving it for him at his last or most usual place of abode with some inmate thereof apparently not under sixteen years of age.

The interpretation clause of the Code, sec. 3, sub-sec. (t), defines "person" to include all bodies corporate "in relation to such acts and things as they are capable of doing," etc.

Section 853 is as follows: "In case the accused does not appear at the time and place appointed by any summons issued by a justice on information before him of the commission of an offence punishable on summary con-

Judgment.

Rose, J.

viction, then if it appears to the satisfaction of the justice that the summons was duly served a reasonable time before the time appointed for appearance, such justice may proceed *ex parte* to hear and determine the case in the absence of the defendant, as fully and effectually, for all intents and purposes as if the defendant had personally appeared in obedience to such summons, or the Justice may, if he thinks fit, issue his warrant as provided by section 560 of this Act and adjourn the hearing of the complaint or information until the defendant is apprehended."

It is admitted by counsel that this offence complained of is not an indictable offence, that the procedure, if any, is that under the summary convictions clauses of the Code, and it is urged on behalf of the company that such clauses do not apply to a corporation and that there is no mode of procedure thereunder against a corporation, that the provisions of the section to which I have referred are clearly provisions applicable to persons not corporations.

In the first place it is pointed out that the summons must be personally served; that upon conviction, if a penalty is awarded, the offender may be committed to jail if he do not pay the penalty, and, generally, that it is clear that proceedings against a corporation were not provided for by the Code. It is also pointed out that under the Code provision has been made for proceeding against a corporation by indictment (see sections 635-639 inclusive), and it is urged that because it was necessary to provide specially for proceeding against a corporation by indictment, it would be necessary to provide a special procedure to bring a corporation within the summary conviction clauses of the Code.

There is no doubt, of course, that under the provisions of the Municipal Act, to which I have referred, it was intended that a corporation should obey and might be compelled to obey the provisions of the by-law which the Legislature empowered the municipality to pass. It must also be remembered that the same legislature which

empowered the municipality to pass a by-law to compel the corporation to obey its provisions passed the Act of incorporation giving the defendant company an existence.

Judgment.

Rose, J.

If the company may be served with process, there is no difficulty I think in working out the provisions of the statute, and I am of opinion upon the examination of the authorities, such as have been cited or I have found, that there is no difficulty in serving a corporation within the provisions of the statute.

In Glen's Summary Jurisdiction Acts, 6th ed., by Bodkin & Douglas, at p. 6, I find a statement of the law as understood by the authors of that work, and I think that the fair result of what is there written is that when service is required it may be effected in any manner known to the law without being specially provided for by statute, and if the effect of the provisions of the Municipal Act, to which I have referred, is that the defendant company is bound to observe its provisions or be proceeded against as an offender, then it seems to me that is in effect a declaration that such company may be served with process in any manner the process might be served upon the company in any proceeding either in a Court of common law, or in a Court of equity, or in a Court for criminal cases only.

If the provisions of the interpretation clause are read into sub-sec. 2 of sec. 562 of the Code, such sub-section will read as follows:—"Every such summons shall be served

* * upon the body corporate, society or company to which it is directed by delivering it to the proper officer of such company personally." The remaining provision "or by leaving it for him at his last or most usual place of abode," of course is inapplicable to service upon a corporation.

In *Newby v. Colt's Patent Fire Arms Co.* (1872), L. R. 7 Q. B. 293, cited by Mr. Fullerton, I find Mr. Justice Blackburn stating the law to be as follows, at p. 296: "At common law the service of a writ on a corporation aggregate, which from the nature of the body could not

Judgment.

Rose, J.

be personal, was by serving it on a proper officer, so as to secure that it came to the knowledge of the corporation," etc.

If service may be effected, I have not to determine whether the service has been proper here; that is a matter for the magistrate to consider when the case comes before him, in the event of the corporation not appearing by counsel or agent in answer to the summons.

Reference may also be had to the following authorities, as throwing some light upon the point: *State v. Western North Carolina R. R. Co.* (1883), 89 N. C. R., 584; *Tidd's Practice* (1828), p. 121.

If the corporation can be served, as I think it can, then it may or may not appear. If it do appear and plead, of course no further question can arise. If it do not appear, then the magistrate may proceed, under the provisions of section 853, to which I have referred, in which case the language of the authors of the Summary Jurisdiction Acts, at p. 6, to which I have referred, is very applicable:—"An opinion is expressed in 16 J. P. 445, that justices may proceed *ex parte* upon proof of service in the mode pointed out in this section. The section applies in all cases where an information is laid or complaint made that any person has committed any offence or act within such justice's jurisdiction irrespective of whether any special provision is made as to particular mode of service of the summons in the Act under the provisions of which such information has been laid." If upon non-appearance the magistrate elect to proceed to a judgment and awards a penalty that penalty may be enforced by distress.

I am aware that in deciding as I am doing, I am placing aside some of the provisions of the statute which can only be enforced against a person and not against a corporation; but the most that I think can be said as to that is that some of the provisions are applicable to persons only, and others are applicable to persons and corporations.

But it was urged that this case was concluded by authority, and I was referred to the case of *Regina v.*

Brennan, decided by a Divisional Court of which I was a member, in June, 1892,* in which it was said that our Court held that a conviction against an incorporated company could not be sustained, as there was no procedure for service of a summons upon a corporation. The case was argued on behalf of the defendant only, no one appearing for the Crown, and I find that the president of the company appeared with his solicitor before the magistrate and tendered evidence which the magistrate refused to receive. It is not stated upon the material whether there was a formal plea entered for the defendant or not, and the contrary not being stated, I assume that the corporation did plead, otherwise I cannot understand why evidence should have been tendered on its behalf. It will be thus seen that on the material before the Court the question as to there being any procedure for service of the corporation could not well arise. The information was under the Master and Servants Act. Although the ground taken here was also taken there, I cannot say from recollection or from any note that I have made of the case that the judgment of the Court proceeded upon such ground, and there being other and sufficient grounds for the judgment then given I consider myself free to express an opinion in this case irrespective of the judgment given in *Regina v. Brennan*.

Judgment.

Rose, J.

The case of *Re Chapman and The Corporation of the City of London* (1890), 19 O. R. 33, was also cited as an authority conclusive and binding. But it is clear that the learned Judge in that case was directing his observations to a case where the offence might be the subject of an indictment, and his language though somewhat general, must, I think, be read in view of the facts of that particular case, and I do not find myself therefore concluded by either the observations or the decision of my learned brother Robertson. Indeed, I am quite certain that he would feel himself perfectly at liberty to consider the case that is now

* Unreported.

Judgment. before me without reference to the opinion that he expressed in such case.
Rose, J.

The case of *Regina v. The T. Eaton Co.*, decided by myself on the 1st of August last, and reported in 29 O. R. 591, is not an authority in the defendants' favour. I rested my decision there solely upon the ground that the proceedings in that particular case should be by indictment. I referred to the *Chapman* case and to another case to which I shall presently refer and concluded my judgment in the following words:—"But I do not further examine that case as I rest my judgment upon the grounds stated." The case to which I referred there was that of *Starcey v. The Chilworth Gunpowder Manufacturing Co.* (1889), 17 Cox's C. C. 55, which case I think affords support to the contention here on behalf of the prosecution. That case was sent back to the magistrate by a Court composed of Lord Coleridge, C. J., and Mathew, J., on a proceeding against the company under the Summary Jurisdiction clauses. It was apparently taken for granted by counsel and by the Court that the corporation might be proceeded against under the procedure in the Act provided for cases against persons.

A summary of that statute has been made by counsel in the case before me and will be found among the papers, and it will be found, upon reference to such summary, or the statute itself, that there is no provision distinctly referring to a corporation. The Act was one to consolidate and amend the law relating to fraudulent marks on merchandise; and section 2 provided that every person who does certain specified things "shall be guilty of an offence against this Act." Section 5: Every person guilty of an offence against this Act shall be liable on conviction on indictment to imprisonment, etc. The interpretation clause of the Act provided that "person" should include "any body of persons corporate or unincorporate." It has been suggested that that case is distinguishable because the company in that case was incorporated under the "Companies Act, 1862," and sections 62 and 63 of that Act provide for the

service of a summons, notice or other document upon the company. Apart from the question which has been raised by Mr. Fullerton as to whether such section as to service was enacted to govern the service of a summons of the nature of that we are now considering, I do not feel at all pressed by its presence in the Act referred to, for I think that apart from any special provision in the Act of incorporation of this company for service upon it service may be made as I have pointed out. In other words, once conceding that the Legislature intended that the corporation should be subject to the provisions of the by-law and should be liable to be proceeded against for an offence against such by-law, then it seems to me it must follow that service of process upon such corporation may be effected in the mode in which any process may be served upon the corporation apart from any statutory provision.

Judgment.

Rose, J.

I think that the motion fails and must be dismissed with costs.

The present appeal was argued on December 12th, 1898, before FALCONBRIDGE, and STREET, JJ.

Bicknell, for the Toronto Railway Company, contended that sec. 703 of the Municipal Act, R. S. O. ch. 223, giving a council power to direct that on default of any person or corporation doing any matter or thing enjoined by by-law, such matter or thing shall be done at the expense of the person in default, is the only section in the Act which refers specifically to a corporation; but that sections 704 to 707, with regard to the recovery and enforcement of penalties, refer only to individuals: that R. S. O. ch. 90, sec. 2, embodies by reference the provisions of the Criminal Code, 55-56 Vict. ch. 29 (D.), but that sections 562, 853, and 858 of the Code as to service of summonses, and what is to be done on default of appearance, do not apply to corporations, on which personal service is impossible; that there is no provision in the Criminal Code for service of a summons on a corporation, though it does provide for the case of an indictment: sec-

Argument. tions 635-639; and a justice of the peace has no power and never had power to compel a corporation to appear in his Court: *Re Chapman and The Corporation of the City of London* (1890), 19 O. R. 33.

Fullerton, Q.C., for the city of Toronto, contended that service could be made on the corporation, just as it could have been if it had been civil process instead of criminal; and that secs. 853 and 858 of the Criminal Code, 55-56 Vict. c. 29, got over all difficulty: *Newby v. Colt's Patent Fire Arms Co.* (1872), L. R. 7 Q. B., at p. 296; Am. & Eng. Ency. of Law, 2nd ed., p. 115, n. 4; *State v. Western North Carolina R. R. Co.* (1883), 22 Am. and Eng. Railroad Cases 58 (89 N. Car. R. 584); *Queen v. Birmingham and Gloucester R. R. Co.* (1842), 3 Q. B., at p. 233; *Consumers' Gas Co. v. City of Toronto* (1896), 23 A. R. 551; *Regina v. Verral* (1889), 18 O. R. 117.

The judgment of the Court was delivered on December 19th, 1898, by

STREET, J. :—

In my opinion we cannot interfere with the judgment appealed against. Sec. 569, sub-sec. 4 of the Municipal Act, R. S. O. ch. 223, gives power to the city council to pass a by-law requiring electric railway companies within the city limits to provide enclosed vestibules upon their cars for the protection of their employes. Section 702 authorizes the imposition by by-law of penalties for the breach of municipal by-laws, and section 704 provides for the enforcement and recovery of such penalties by summary proceedings before a justice of the peace.

The city council of Toronto have passed a by-law within the powers conferred upon them by sub-sec. 4 of sec. 569, and authorizing a penalty not exceeding \$50, for each offence against the by-law, in the discretion of the magistrate. The corporation of the city of Toronto have now laid or caused to be laid an information charging the Toronto

Railway Company with a breach of the by-law, and the company say that they cannot be proceeded against under the by-law because the provisions of the Criminal Code with regard to summary convictions are not applicable to corporations.

Judgment.

Street, J.

We have here a plain legislative authority for the imposition upon a corporation of a penalty in case of a breach by the corporation of a city by-law, and we should not allow the provision to be defeated upon any mere technicality unless compelled to do so. By chapter 90 of the Revised Statutes of Ontario it is provided that where a penalty or punishment is imposed under the authority of any statute in the Province of Ontario and is recoverable before or may be inflicted by a justice of the peace, the like proceedings and no other may be had for the recovery of it, etc., as under the statutes of the Dominion might be had if the penalty had been imposed by a statute of the Dominion.

In effect we have a by-law imposing a penalty upon a corporation in pursuance of an Act authorizing such imposition and this Act providing that the remedies for the recovery of the penalty in question from the corporation are to be the same as those provided by the Criminal Code in regard to summary convictions for offences against its provisions.

The provisions contained in the Code afford the only means of enforcing convictions for breaches of municipal by-laws and there is no mode of enforcing convictions under such by-laws where the offenders are corporations unless it can be done under the provisions of the Code. It being clearly the intention of the Municipal Act to punish corporations in certain cases for breaches of municipal by-laws, I should be prepared to hold that the machinery provided by the Code must be applied to corporations as well as to natural persons for the purposes of the Municipal Act even though it were necessary for any reason to hold it to apply only to natural persons in regard to offences created by, or coming within the scope of, Dominion legislation.

Judgment.

Street, J.

There is, however, no reason in my opinion for holding that the Code does not apply in regard to offences punishable by summary conviction to corporations as well as to natural persons. By sub-sec. (t) of sec. 3, it is provided that "the expressions, 'person,' 'owner' and other expressions of the same kind include Her Majesty and all public bodies, bodies corporate, societies, companies, and inhabitants of counties, parishes, municipalities or other districts, in relation to such acts and things as they are capable of doing and owning respectively."

This is perhaps only another way of stating as is stated in the general Interpretation Act, R. S. C. ch. 1, sub-sec. (22), that the expression "person" includes any body corporate or politic, etc., "to whom the context can apply according to the law of that part of Canada to which such context extends."

But taking the Code interpretation alone, we find the expression "every one," "no one," "no person," and "any person," used throughout the Code in a manner shewing that "every one" means "every person," and "no one" means "no person"; so that "one" in the Code, thus used, is an expression "of the same kind" as "person," and is subject to the same interpretation, viz., that it includes a corporation in relation to such acts as corporations are capable of doing, such, for instance, as committing offences under the clauses relating to the fraudulent marking of merchandise which are punishable in the alternative by indictment or on summary conviction.

The objection that the portion of the remedy provided for the recovery of the penalty and costs by way of imprisonment in default of sufficient distress, is inapplicable to corporations seems to me not entitled to weight because it is not a necessary part of the conviction that it should be applied. A similar objection urged by a corporation in *Rex v. Gardner*, 1 Cowp. 79, against its being rated for poor rates because the remedy by imprisonment upon failure of distress was impossible, was held not entitled to weight. See also *Queen v. The Birmingham & Gloucester R. W. Co.* (1842), 3 Q. B. 223.

I have nothing to add to the answers contained in the judgment of my brother Rose to the objection that the Code contains no provision as to how a corporation is to be served with a summons. If we come to the conclusion that the Code was intended to provide for the summary conviction of corporations for offences, it will be the duty of the Courts, in the absence of special directions as to the manner in which they are to be served with the summons, to see that it is properly brought to their notice. Section 637 of the Code shews what is considered proper service of notice of an indictment, and there is no reason why similar notice should not be good in the case of a summons.

In my opinion the conclusion at which my brother Rose arrived was right, and the appeal from it should be dismissed with costs.

A. H. F. L.

[DIVISIONAL COURT.]

LEGGATT V. BROWN.

Contract—Consideration in Part Illegal—Stifling Prosecution.

Held, affirming the judgment of MACMAHON, J., 29 O. R. 530, that the promissory notes sued upon in this action were given on an illegal agreement, of which the plaintiff must be taken to have had knowledge; that the whole agreement, being based upon the understanding that one of the defendants was to be discharged from custody, was illegal and void; and the plaintiff could not properly litigate the right to certain other promissory notes transferred by one of the defendants to another.

AN appeal by the plaintiff from the judgment of MACMAHON, J., 29 O. R. 530, dismissing the action, which was brought to recover the amount of certain promissory notes made in favour of the plaintiff by the defendants Altha Ann Brown and John Walton Baker, and to set aside the transfer by the defendant Altha Ann Brown to her co-defendant W. E. Brown of certain promissory notes made by W. J. Saunders and George H. Saunders.

Judgment.

Street, J.

Statement.

Statement. The action was dismissed by the trial Judge upon the ground that the notes made to the plaintiff were given upon an illegal agreement to stifle a prosecution of the defendant W. E. Brown, and were void.

The appeal was heard by a Divisional Court composed of ARMOUR, C. J., FALCONBRIDGE and STREET, JJ., on the 26th and 27th January, 1899.

Aylesworth, Q.C., and *George Kerr*, for the plaintiff, referred to *Jones v. Merionethshire Permanent Benefit Building Society*, [1891] 2 Ch. 587, at p. 596; [1892] 1 Ch. 173; *Flower v. Sadler* (1882), 10 Q. B. D. 572; *Fisher v. Apollinaris Co.* (1875), L. R. 10 Ch. 297.

Wyld, for the defendants Altha Ann Brown and J. W. Baker, referred to *Bell v. Riddell* (1884), 2 O. R. 25, 10 A. R. 544.

Fripp, for the defendant W. E. Brown.

February 7, 1899. The judgment of the Court was delivered by

ARMOUR, C. J. :—

I am of the opinion that the judgment appealed from is right and should be affirmed.

The firm of W. E. Brown & Co. had carried on business at Ottawa as boot and shoe merchants, and had failed in business and had made an assignment under the provisions of R. S. O. ch. 147 to one P. S. Bazin. The said firm was composed of one Charles Ernest Baker, a son of the defendant Altha Ann Brown, alone; and W. E. Brown was the manager of the said business for the said firm, and was the husband of the defendant Altha Ann Brown. On the 30th July, 1896, one James Robinson, a creditor of the said firm, laid an information before a justice of the peace, charging that, prior to the said assignment, and on or about the 6th day of January, 1896, the said firm, by the procurement of the said W. E. Brown, transferred certain

goods and chattels, the property of the said firm, to one Judgment.
W. J. Saunders, with intent to defraud the creditors of the Armour, C.J
said firm or some of them. Upon this information a
warrant was on the same day issued for the apprehension
of the said W. E. Brown, and he was arrested thereunder,
and was brought before the police magistrate of the city
of Ottawa on the 6th August, 1896, and was remanded till
the 10th August, 1896, when he was again remanded
till the 17th August, 1896, when he was again remanded
until the 18th August, 1896, and was admitted to bail, and
on the 18th August, 1896, the case was adjourned till the
25th August, 1896, and upon the 25th August, 1896, the
case was adjourned by agreement until the 1st September,
1896. On the 26th August, 1896, the offer was made by
the defendants Altha Ann Brown and John Walton Baker
which is set out in the judgment of the learned trial
Judge, and on the 1st September, 1896, the said W. E.
Brown was discharged.

I have no doubt that the offence with which the said
W. E. Brown was charged was a public offence, and one
which could not be compromised, and that the offer made
by the defendants Altha Ann Brown and John Walton
Baker of the 26th August, 1896, was based wholly or in
part upon the understanding that the said W. E. Brown
was to be discharged from the said prosecution. The
defendant Altha Ann Brown testified that the discharge
of her husband, W. E. Brown, was the main object she
had in view in the offer, and there is no contradiction of
her evidence, and the stipulations in the offer that "each
creditor accepting this proposition being thereby held to
agree that he will not hereafter, directly or indirectly,
institute or be a party to any action or proceeding against
the said W. E. Brown, or the said Daniel McCallum, or any
other person whosoever, in respect of any matter or thing
in any wise connected with the affairs or business of the
said Charles Ernest Baker or the said firm of W. E.
Brown & Co.," and that "the said W. E. Brown and
Daniel McCallum to release James Robinson, and all

Judgment. persons acting on his behalf, from all claims for damages
Armour, C.J. for false imprisonment or otherwise," shew clearly that
the understanding was that W. E. Brown should be discharged. And there is also the pregnant fact that, upon this offer having been made, no one appeared to carry on the prosecution, and W. E. Brown was discharged.

But it is argued that there is no proof that the plaintiff had any knowledge that the understanding was that W. E. Brown was to be discharged.

The circumstances, however, in my opinion, raise such a presumption that he did know that such was the understanding, as made it incumbent upon him to give evidence of his want of knowledge of it.

It is difficult to believe that he did not know of the criminal proceedings that had been taken by Robinson and of the arrest of W. E. Brown therein. And the stipulations in the offer to which I have referred would shew to any one of ordinary intelligence that he was to be discharged, and I think that the fair inference from all the circumstances is that he did know.

I agree in the learned Judge's judgment that the whole agreement, based as it was in whole or in part upon the understanding that W. E. Brown was to be discharged, was illegal and void ; and, this being so, the assignee was the only person who could litigate the right to the Saunders notes, and the plaintiff could not properly litigate that right.

The motion will be dismissed with costs.

E. B. B.

[DIVISIONAL COURT.]

LINDSAY V. ROBERTSON ET AL.

Landlord and Tenant—Creation of New Term by Overholding—Delivery of Keys—Continued Occupation of Part of Premises—Use and Occupation—Evidence of Value.

Upon the expiry of a parol lease for a term certain, with an option in the lessees to renew for a fixed period, the facts that the keys of the demised premises were not delivered by the lessees to the lessor for two or three days after the expiry of the term, and that a sub-tenant of the lessees continued thereafter in possession of a portion of the premises, are not sufficient to constitute an exercise by the lessees of their option to renew. Such possession of the sub-tenant is, however, sufficient to make the lessees liable for use and occupation, as to which the rent payable under the lease which has expired may be some evidence of the value of the premises, although no particular contract is to be inferred from the mere fact of holding over.

THIS was an action brought by Helen Lindsay on the Statement.
20th May, 1898, in the County Court of the county of Elgin, to recover \$250, being one quarter's rent alleged to be due on the 12th May, 1898, upon a parol lease of certain premises in the city of St. Thomas, from the defendants, a firm of merchants, who were her tenants.

The defendants denied the existence of the tenancy during the period for which rent was claimed, and set up the Statute of Frauds.

The action was tried before the Judge of the County Court on the 27th June, 1898, without a jury, and a verdict was given and judgment ordered to be entered for the sum claimed.

The material facts are set forth in the judgment of this Court.

From the judgment of the County Court the defendants appealed, and the appeal was argued before a Divisional Court composed of ARMOUR, C. J., FALCONBRIDGE and STREET, JJ., on the 27th January, 1899.

E. D. Armour, Q.C., for the appellants.

W. K. Cameron, for the plaintiff.

Judgment. February 13, 1899. The judgment of the Court was
Street, J. delivered by

STREET, J.:—

I should find upon the evidence that the defendants, down to the 12th February, 1898, were tenants to the plaintiff at \$1,000 a year, payable quarterly, of the whole of the plaintiff's premises, including the portion occupied by Miss McIntyre, for a term which expired on the 12th February, 1898, but which the defendants had the right to renew for a further period of two years. The agreement for this tenancy was by parol, but it was acted on by both parties; the plaintiff having expended a large sum of money in alterations required by the defendants, and they having taken possession and paid rent. Before the expiration of the term the defendants notified the plaintiff that they did not intend to exercise their option, and at her request they wrote her solicitors on the 3rd January, 1898, that she was at liberty to re-rent them, and they accordingly advertised for, but were not successful in finding, a tenant for them. The defendants, within two or three days after the 12th February (the exact date is in dispute, but is not important), sent the keys of the shop which they had occupied to the plaintiff, who returned them at once, under the advice of her solicitors, upon the ground that they should have been returned on the 12th February, and that the defendants had not relieved themselves of their liability to pay rent, and were therefore in for another term.

At the time the plaintiff rented the whole of the premises, Miss McIntyre was in possession of a room at the back of one of the shops as tenant to the plaintiff. Upon the arrangement being made by the plaintiff with the defendants, she became their tenant and paid \$30 rent to them. She was in possession under them on the 12th February, 1898, and did not leave when the defendants moved out, but was still in possession at the time of the

trial. No discussion as to the effect of her tenancy seems to have taken place between the plaintiff and defendants after the defendants left the premises, and neither the plaintiff nor the defendants had asked her to give up possession.

Judgment.

Street, J.

The plaintiff set up in her pleadings that she had made the alterations upon the faith of a promise on the part of the defendants that they would take the premises for the extended term; but it is impossible to hold that what took place in this regard had the force of a contract. The question appears to be reduced to this: Are the defendants liable to pay the rent sued for by reason of their not having delivered up the keys upon the expiration of their term, and by reason of the continuance of Miss McIntyre's possession?

In my opinion, neither of these circumstances is sufficient to support the claim put forward by the plaintiff, that by reason of them the defendants must be taken to have exercised the option of taking the place for the extended period of two years.

The only remaining ground upon which the plaintiff can claim to recover is for use and occupation, and upon this ground, I think, a liability upon the part of the defendants was shewn, based upon the principle laid down in *Harding v. Crethorn* (1793), 1 Esp. 57, and approved in *Christy v. Tancred* (1840), 7 M. & W. 127; *Henderson v. Squire* (1869), L. R. 4 Q. B. 170; *Ibbs v. Richardson* (1839), 9 A. & E. 849: thus expressed in the case first mentioned: "When a lease is expired, the tenant's responsibility is not at an end; for if the premises are in possession of an under-tenant, the landlord may refuse to accept the possession, and hold the original lessee liable; for the lessor is entitled to receive the absolute possession at the end of the term."

The plaintiff, it is true, made no claim in her statement of claim to recover for the use and occupation of the premises, but the defendants' counsel, waiving objection on this ground, proposed to offer evidence of the value of the

Judgment.

Street, J.

premises, but the evidence was objected to by counsel for the plaintiff, and the objection was sustained after a formal tender of the evidence. The objection made to the evidence was that the lease itself fixed the value of the premises.

In my opinion, the evidence tendered was improperly rejected. No particular contract is to be inferred from the mere fact of a holding over after the expiration of a term. What the contract was is a matter of fact and not of law. The contract to pay rent at the rate of \$1,000 a year was at an end; the defendants held on without paying rent. In the absence of evidence to the contrary, the former rent would be some evidence of the value of the premises, but evidence which might be rebutted: *Mayor of Thetford v. Tyler* (1845), 8 Q. B. 95; 2 Sm. L. C., 10th ed., p. 121, under *Doe d. Rigge v. Bell* (1793). The rebutting evidence which the defendants wished to give having been excluded at the request of the plaintiff's counsel, the judgment for the plaintiff cannot stand and must be set aside. If we were to treat the action as one for use and occupation, the amount claimed might be beyond the jurisdiction of the County Court.

The appeal must, therefore, be allowed with costs, and judgment entered dismissing the action with costs, but without prejudice to a new action being brought for use and occupation, if the plaintiff be so advised.

E. B. B.

[DIVISIONAL COURT.]

JOHNSTON V. DULMAGE ET AL.

Bankruptcy and Insolvency—Assignee for Creditors—Costs of Action Brought by—Remuneration and Disbursements of—Liability of Creditors—Indemnity.

An assignee for the benefit of creditors, under the Assignments Act, cannot charge creditors personally with the costs of an action brought by him on behalf of the insolvent estate, unless upon a direct or implied promise of indemnity, but must look to the assets of the estate; and so, too, with regard to his remuneration for and disbursements in winding up the estate.

THIS was an action brought by Peter Johnston, assignee of the estate and effects of Alexander Clancy, under an assignment made in pursuance of 48 Vict. ch. 26 (O.), in trust for the benefit of the creditors of Clancy, against William Dulmage, Henry Clancy, Mrs. Coleman Wartman, and the Ontario Mutual Life Assurance Company, to recover the sum of \$1,500. Statement.

The plaintiff alleged that at a meeting of the creditors of Clancy the defendant Dulmage was appointed one of the inspectors of the estate, and chairman of the inspectors, and the plaintiff, as assignee, acted under the directions and instructions of Dulmage; that all the defendants were creditors of Clancy in amounts in excess of \$100 each; that the defendants instructed the plaintiff to commence proceedings in the High Court of Justice for Ontario to recover damages against the Rathbun Company for trespass to certain lands which formed part of Clancy's estate, and to carry on such proceedings through Messrs. McIntyre & McIntyre, solicitors; that the plaintiff, pursuant to such instructions, brought an action, by Messrs. McIntyre & McIntyre, against such company, and brought it to trial, when it was dismissed with costs, and, in pursuance of instructions received from the defendant Dulmage, brought on an appeal for hearing before a Divisional Court, which appeal was also dismissed with costs; that the plaintiff had been obliged to pay and had paid his costs of such

Statement. action and appeal and the costs of the Rathbun Company, and sufficient had not been realized out of the estate of Clancy to reimburse him; that an order had been made by a County Court Judge, under the statute, allowing the plaintiff \$300 as remuneration for his trouble and expense in the management of the estate; that the defendant Dulmage had paid to the plaintiff \$147.77, the costs of the appeal in the *Rathbun* case, but the plaintiff had not been paid any other sum on account of the costs in that case, nor on account of the \$300 allowed to him as remuneration; and he therefore claimed \$1,500 from the defendants. The plaintiff, by an amendment, made an additional claim for disbursements made by him in the suit against the Rathbun Company and in the carrying out of the trusts of the deed of assignment.

The defendants denied giving instructions for the action referred to, and disclaimed all liability.

The action was tried before ROSE, J., without a jury, at Napanee, on the 26th April, 1898. The facts are stated in the judgment.

Walkem, Q. C., for the plaintiff.

A. Millar, Q. C., for the defendants the Ontario Mutual Life Assurance Company.

Deroche, Q. C., and *Madden*, for the other defendants.

July 14, 1898. ROSE, J. :—

The plaintiff's claim is for \$300, remuneration claimed by him as assignee, \$364.41, disbursements, total \$664.41; also \$546.79, taxed costs in a suit of *Johnston v. The Rathbun Company*, in which he was unsuccessful. The plaintiff has in hand \$466.89, moneys of the estate, which, if applied on his remuneration and disbursements, would leave a balance due him, according to his claim, of \$197.52. There are no other available assets. The assignee will, therefore, be unable to realize out of the estate any portion of the balance of his claim.

I do not see how he can succeed against the defendant Dulmage for the costs incurred in the suit of *Johnston v. The Rathbun Company*. Dulmage was acting as one of the inspectors of the estate and as agent for one King, a creditor of the estate. As inspector he went with the plaintiff to Messrs. McIntyre & McIntyre to consult them with reference to bringing the action. The meeting of creditors at which instructions were given to consult Messrs. McIntyre & McIntyre authorized the plaintiff and the inspectors to go to the Messrs. McIntyre to consult them as to whether it was advisable to enter an action to recover damages for timber cut on the Kennebec lot by the Rathbun Company. I extract this from the examination for discovery of the plaintiff, which was put in at the trial.

Judgment.

Rose, J.

The plaintiff, of course, knew the office of the defendant Dulmage, as well as Dulmage knew that the plaintiff was waiting upon the Messrs. McIntyre as the assignee of the estate. They both represented the same interest, one as assignee and the other as inspector or adviser. They consulted Mr. John McIntyre, Q. C., who also knew their relative positions; and upon his advice instructions were given to have the action brought. The action was brought in the name of the plaintiff. I do not see how, upon such a state of facts, it is possible for the plaintiff to say that the defendant Dulmage, attending there as inspector on behalf of creditors, intended to or did in fact make himself personally liable. His advice to go on with the suit would, of course, be a fact to be considered upon the plaintiff claiming to retain the costs of the litigation out of the assets of the estate, and would probably justify him in retaining them. But there being a deficiency of assets, I do not see how Dulmage, as inspector, can in any sense be said to be responsible.

Nor do I see how he is liable personally. King, the principal for whom he acted, proved his claim by affidavit made by himself. Dulmage was not a creditor, and he was appointed inspector and acted, to the knowledge of all

Judgment.

Rose, J.

parties, as agent for King. King is not a party to this record; and there being no misrepresentation, the fact of agency being known to all parties, if there was any liability incurred, it would be incurred for and on behalf of King. I express no opinion at all as to whether Dulmage made himself responsible to Messrs. McIntyre & McIntyre by reason of what took place in their office. It is not necessary for me to consider that question.

Nor do I see how the plaintiff can recover against Dulmage for his remuneration and disbursements. In the first place, he is not a creditor at all; in the second place, anything he did, as I have said, was either as inspector or as agent for King; and in the third place, the assignment was by deed drawn pursuant to the Act respecting assignments for the benefit of creditors, 48 Vict. ch. 26, now consolidated in R. S. O. ch. 147; and one of the trusts declared by such deed is as follows: "Upon trust, in the first place, to pay the cost of and incidental to the preparation and execution of these presents; secondly, to deduct and retain such remuneration as shall be voted or fixed for him, the said assignee, under the provisions of the said Act; and thirdly, to pay the debts and liabilities of the said debtor." The Act specifically referred to provided (sec. 11) as follows: "The assignee shall receive such remuneration as shall be voted to him by the creditors at any meeting called for the purpose after the first dividend sheet has been prepared, or by the inspectors, in case of the creditors failing to provide therefor, subject to the review of the County Court of the county in which the assignment is registered or the Judge thereof, if complained of by the assignee or any of the creditors."

The Revised Statutes, ch. 147, contain additional provisions, in secs. 32 and 33, but, even invoking them, the provision is only that, following the procedure therein laid down, he may retain as his remuneration a sum not exceeding five per cent. of the cash receipts, subject to review by the Court or Judge as hereinbefore provided. Whether we look, therefore, at the deed or the statute, we find no

provision for the assignee being paid any remuneration except out of the assets of the estate, nothing in the deed or in the statute, as far as I have been able to discover, which would make any creditor personally liable for remuneration or disbursements. For these reasons, I think that the action fails as against the defendant Dulmage.

The action was dismissed as against the Ontario Mutual Life Assurance Company at the trial. As to the other defendants, Clancy and Wartman, for the reasons I have given, founded upon the provisions of the deed and the statute, I think neither Henry Clancy nor Mrs. Coleman Wartman is liable to the assignee for the balance of his remuneration and disbursements.

Can either of them be held liable for the costs of the unsuccessful litigation? It is a well known rule of law that a trustee becoming a litigant is liable for costs, the same as any other litigant. If the costs were properly incurred in the execution of a trust, then the trustee may retain them out of the assets of the estate. If they were not properly incurred, then he must pay them personally. If there are no assets, he pays them and must look to be recouped by any creditor from whom he has an indemnity. There was no indemnity here, unless the vote of the creditors appointing the inspectors and directing them to take legal advice was such an authorization or request to the plaintiff as to entitle him to claim indemnity from the creditors who voted for such resolution. If the position of the assignee and the creditors is that of trustee and *cestuis que trust*, then possibly, upon a proper case, proceedings instituted and carried on at the request of the *cestuis que trust* and for their benefit would be at their risk, and the plaintiff would be entitled to call upon his *cestuis que trust* to indemnify him against any loss. But, on the facts here, I cannot find that either Henry Clancy or Mrs. Wartman authorized this litigation. Certainly on the evidence I think Mrs. Wartman clearly did not. I have had some doubt about Clancy, but when I look at the statement of what the resolution was under

Judgment.

Rose, J.

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Rose, J.

which the consultation with Mr. McIntyre was had, I do not think that I am justified in finding that Clancy ever did instruct the plaintiff to begin these proceedings or to carry them on for his benefit. Certainly, his action when he heard the case was going on for trial was contrary to any such intention. Of course, if he had clearly instructed the proceedings to be carried on, what he did prior to the action being brought to a hearing might not have relieved him.

It is clear now that the assignee should have asked for indemnity before allowing the proceedings to be instituted. It may be that he thought that the money he had in hand, or would have in hand, would be sufficient for the purpose. However that may be, I do not think he has established on the evidence any grounds of action against any of the defendants. Possibly it was not in the contemplation of any of the parties that the costs would exceed the assets which would be in hand after paying the mortgage debt. I do not know how that was, but it would require a very clear case indeed, I think, to fix creditors with liability for litigation arising out of the administration of a trust estate, where there were assets—the natural conclusion in such a case being that all parties were of the opinion that the costs of the litigation would come out of the estate.

The action must be dismissed, and I see no sufficient grounds for withholding costs. I have been in doubt as to whether I should allow the defendant Dulmage his costs, but I am not sufficiently clear to warrant me in departing from the usual rule.

Entry of judgment will be stayed for thirty days.

The following cases may be referred to: *Smith v. Beal* (1894), 25 O. R. 368; *Macdonald v. Balfour* (1893), 20 A. R. 404, especially at p. 410; and *Fraser v. Province of Brescia Steam Tramways Co.* (1887), 56 L. T. N. S. 771, referred to by Osler, J. A., which case reviews the decisions in *Ex p. Angerstein* (1874), L. R. 9 Ch. 479, and *Pitts v. LaFontaine* (1880), 6 App. Cas. 482.

The plaintiff appealed from the judgment of ROSE J., and his appeal was heard by a Divisional Court composed of ARMOUR, C. J., FALCONBRIDGE and STREET, JJ., on the 25th January, 1899. Argument.

Walkem, Q. C., for the plaintiff, cited Lewin on Trusts, 10th ed., p. 761; *Smith v. Beal* (1894), 25 O. R. 368, 376.

Aylesworth, Q. C., and *Deroche*, Q. C., for the defendants Dulmage, Clancy, and Wartman, referred to *Cowie v. Muir-den*, [1893] A. C. 674.

February 9, 1899. ARMOUR, C. J.:—

I do not think that an assignee under the Act respecting assignments and preferences by insolvent persons can bring an action without the authority of the creditors and charge them personally for his indemnity against the costs of such action. And I think, moreover, that it would be open to the creditors to question his right to charge the costs of an action so brought against money in his hands as such assignee on the ground that he had acted unreasonably in bringing such action. I think, also, that if the creditors passed a resolution requiring the assignee to bring an action, it would raise an implied liability on the part of the creditors concurring in it to indemnify the assignee against the costs of such action; and I also think that if any creditor or creditors required the assignee to bring an action, and he did so at his or their request, there would arise an implied liability on the part of such creditor or creditors to indemnify the assignee against the costs of such action.

The evidence in this case is on all sides extremely unsatisfactory, and I do not think that from it we can reasonably conclude that there was any implied liability to be inferred from it on the part of any of the defendants to indemnify the plaintiff against the costs incurred by him in the suit brought by him against the Rathbun Company.

In his examination for discovery the plaintiff said: "The writ was issued in the name of Peter Johnston, the assignee of Alexander Clancy for the benefit of creditors, by Messrs.

Judgment. McIntyre & McIntyre of Kingston. I do not know as I Armour, C.J. got any instructions at all to issue the writ."

If he got no instructions to issue the writ, he must have done it of his own motion, and the conduct of the defendant Dulmage is consistent with his interest in the litigation, and does not shew that he acted in such a way as to raise the inference of an implied liability on his part to indemnify the plaintiff against the costs of the litigation.

The motion must be dismissed with costs.

FALCONBRIDGE, J.:—

Unless the plaintiff succeeds in establishing the principle that all the creditors were bound by a resolution passed at the meeting, whether such creditors were present at the meeting or not, and that there was a resolution, duly passed in accordance with the statute, to authorize the litigation, there can be no pretence to hold Mrs. Wartman liable. The plaintiff says on his examination for discovery that she "did not know anything about the writ going to be issued from me, and never gave any instructions to have the writ issued, nor did her husband, unless he acquiesced in what took place at the meeting at Hope's hotel, if he was present."

The plaintiff does not give a satisfactory explanation of the non-production of the minutes or resolutions which are of importance here, and wherever there is anything in dispute it ought to be taken most strongly against him.

And therefore the learned trial Judge is, in my opinion, clearly right in finding as a fact that the resolution was only to consult Mr. McIntyre as to whether it was advisable to enter an action against the Rathbun Company, and was not an authorization to bring an action.

It follows that the finding by the Judge that neither Clancy nor Mrs. Wartman authorized or instructed the plaintiff to begin and carry on that suit should stand.

Dulmage's position is different. He was not a creditor, even as trustee. He acted under a power of attorney from King, who was by far the largest creditor, and who proved his own claim by his own affidavit.

So that even the affirmance of the doctrine that a resolution duly passed would bind a non-assenting or an absent creditor would not affect him, and he can only be held, if at all, by reason of his own personal acts or conduct.

Judgment.

Falconbridge,
J.

Dulmage's evidence was in some respects not very satisfactory, but neither was that of the plaintiff. True, Dulmage had an ulterior object in view, as a successful suit would be of advantage in a like case, to a relative of his own, and this object he furthered by carrying on the appeal at his own expense, and paying the costs thereof. But as to this also I agree with the trial Judge on the facts and the law.

The old Insolvent Acts (*e.g.*, Act of 1875, sec. 35, and 40 Vict. ch. 41, sec. 12), gave reasonably clear directions as to the appointment, powers, and duties of inspectors. These are not fully defined in the R. S. O. 1897 ch. 147.

Smith v. Beal (1894), 25 O. R. 368, and other cases on the same line, affect only the rights of an assignee having sufficient funds in hand, to charge against the estate costs of unsuccessful proceedings.

The appeal ought to be dismissed with costs.

STREET, J. :—

I entirely agree in the judgment appealed from. The plaintiff was not at all bound to enter upon the litigation which resulted in the costs he incurred ; he seems, however, to have been very anxious to undertake it, and *primâ facie* he is entitled to look only to the estate in his hands, and not to any person for his indemnity. He might have refused to proceed without an indemnity, or there might be facts from which a promise of indemnity might be collected. Here there is certainly no actual promise of that kind, and the facts are not, in my opinion, such as to warrant us in finding an implied one. The case so far as the claim to remuneration is concerned is still weaker.

I agree that the motion must be dismissed with costs.

E. B. B.

RANDALL V. ATKINSON.

Evidence—Admissibility—Death of Witness before Cross-examination.

Held, upon a review of the authorities, that the depositions of the defendant taken on his own behalf upon a reference were admissible in evidence, notwithstanding that he had died pending an adjournment of the reference, prior to cross-examination, so that the plaintiff had been deprived of the opportunity of cross-examining him.

Statement. AN appeal by the defendant by revivor from a ruling of Mr. Marcon, a special referee, that the evidence of the original defendant, now deceased, taken on the reference, but not completed, was inadmissible as evidence, because the plaintiff had not the opportunity of cross-examining the defendant.

The appeal was heard by ROSE, J., in the Weekly Court, on the 1st February, 1899. The arguments and cases cited are all referred to in the judgment.

Wallace Nesbitt, for the appellant.

W. M. Douglas, for the plaintiff.

February 13, 1899. ROSE, J.:—

This was an appeal from the ruling of the special referee, Mr. Marcon, to whom a reference was directed to take an account, pursuant to the judgment entered herein on the 25th day of March, 1895.

During the reference the defendant was examined as a witness on his own behalf, and in the course of his examination a question arose as to the scope of the reference; a ruling was made by the referee, from which an appeal was taken; and on the 28th October, 1896, the Court made an order confining the reference. The reference was not proceeded with until the 19th October, 1898. In the meantime the defendant died. The defendant's counsel states that he had concluded the examination of his client at the time that the enlargement was made for the purpose

of appealing from the ruling of the referee. The counsel for the plaintiff states that he had no notice whatever of this fact, and I think it is manifest that the examination was only concluded by reason of the directions in the order of October, 1896, limiting the scope of the reference. Had the judgment been the other way, it seems to me, it is probable that the examination in chief would have been continued. In any event, it is clear, I think, that the plaintiff's counsel had no notice that the defendant's counsel had concluded his examination in chief. If that was the intention of the defendant's counsel, it does not appear that he informed either the referee or the counsel for the plaintiff.

Judgment.

Rose, J.

It is further stated upon the material before me that the delay in proceeding with the reference was that of the defendant's solicitor; that the plaintiff's solicitor made application to him from time to time to have the reference proceeded with, but it was not proceeded with to suit the convenience of the defendant. However that may be, I do not think, in view of the fact that the plaintiff's solicitor thought that the examination in chief had not been concluded, that he can be said to have been in fault.

The referee ruled that, as the defendant had died prior to cross-examination, so that the plaintiff had been deprived of the opportunity of cross-examining him, his evidence must be expunged. From that ruling this appeal has been taken.

I have gone through all the authorities to which I have been referred and which I have been able to find after the most careful search that it has been in my power to make.

The exact point was raised and determined in Ireland, in a case of *Rex v. Doolin*, reported in *Jebb's Crown and Presentment Cases*, p. 123. The decision was in 1832. The head-note is as follows: "Where a witness, after having been examined for the prosecution, fainted shortly after the commencement of his cross-examination, so as to render it impossible for him to give any further

Judgment.

Rose, J.

evidence: Held, by seven Judges against five, that a conviction upon such evidence as had been already given by this witness, taken together with the evidence of other witnesses, was good." The case came before twelve Judges; seven of them were of the opinion that the conviction was proper and that the learned Judge had pursued the proper course in leaving the case to the jury and submitting to them the evidence of the witness who had been taken ill, accompanied by such observations as from that circumstance he might think fit to make. They held that this was one exception to the general rule that the witness should be subjected to cross-examination; that the cross-examination being prevented not by any fault of the parties but by the act of God, the evidence which had been properly taken could not be expunged from the record, but that the case properly went to the jury with such observations as the learned Judge might see fit to make as to the weight to be given to such evidence. Five of the Judges were of the opinion that the conviction was wrong. Torrens, J., thought that the jury ought to have been discharged; Smith, B., thought the same, and that the evidence of the witness should not have been submitted to the jury. The other three Judges were of opinion that the evidence ought not to have been submitted to the jury. They insisted on the generality of the rule that all witnesses should be subjected to cross-examination, and that if this cannot take place, the evidence is not complete, and cannot be submitted to the jury, if objected to. This decision is in accordance with previous rulings in the Irish Courts, to two of which I refer: *O'Callaghan v. Murphy* (1804), 2 Sch. & Lef. 158; *Nolan v. Shannon* (1828), 1 Molloy 157.

In *O'Callaghan v. Murphy* the Lord Chancellor (Redesdale) compared the case to that of a witness at *nisi prius* dropping dead after his direct and before his cross-examination, in which case, he said, he apprehended the party producing the witness would not lose the benefit of the evidence given.

In *Nolan v. Shannon* the Lord Chancellor (Hart) made an order that the parties might be at liberty to use at the hearing the depositions of a witness who died the day after his examination in chief, before he could be cross-examined. The depositions were completed and signed. The Lord Chancellor said: "Take the order, as the depositions are perfected, although no cross-examination could be had: *valeant quantum*. But if the witness had died before he signed his deposition, no use could be made of his testimony."

Judgment.

Rose, J.

If the decision in this case rested upon the authorities to which I have referred, there could be no doubt as to the conclusion to be arrived at.

In 1718 the case of *Copeland v. Stanton*, 1 P. Wms. 414, was decided, where it was held that where a witness dies after examination, but before such examination is signed by him, the depositions cannot be made use of. This case evidently turned upon the depositions not having been completed by reason of the witness having the liberty to amend or alter them upon their being read over to him before he signed them. In the report of that case reference is made to a subsequent case of *Debrox v. ———*, decided in Michaelmas term, 1722, where Lord Chancellor Parker ordered that a defendant might make use of the depositions taken of a witness, where the re-examination of the witness had been prevented by the act of God, he having died before he could be re-examined.

In 1813 the case of *Cazenove v. Vaughan*, 1 M. & S. 4, was decided. This case is cited as an authority against the use of the depositions in this case, by reason of the rule laid down by Lord Ellenborough, C. J., which was as follows: "The rule of the common law is, that no evidence shall be admitted but what is or might be under the examination of both parties; and it is agreeable also to common sense, that what is imperfect, and, if I may so say, but half an examination, shall not be used in the same way, as if it were complete. But if the adverse party has had liberty to cross-examine, and has not chosen to

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Rose, J.

exercise it, the case is then the same in effect as if he had cross-examined ; otherwise the admissibility of the evidence would be made to depend upon his pleasure, whether he will cross-examine or not ; which would be a most uncertain and unjust rule. Here then the question is whether the defendant had an opportunity of cross-examining."

This case was most carefully considered and discussed by the Court of Errors in the case of *Forrest v. Kissam* (1844), reported in 7 Hill (N.Y.) 463, where it was held, reversing the decision of the Court below, that the referees had no right to reject the evidence of a witness who died after direct and before cross-examination, the adjournment taking place after the direct examination, with the consent of both parties, nothing being said as to the intention to cross-examine. Chancellor Walworth gave his reasons for concluding that the point here in question and there in question was not decided. As *Cazenove v. Vaughan* has been relied upon as an authority for expunging the evidence, and also as shewing that Lord Redesdale was mistaken when he expressed the opinion above given, that if a witness drops suddenly dead at *nisi prius* after his direct and before his cross-examination, the party would not lose the benefit of the evidence, I think it well to give at length the observations of Chancellor Walworth with reference to that case : "In the case of *Cazenove v. Vaughan* (1 Maule & Selw. Rep. 4), referred to in the opinion of the Chief Justice, no such question arose. For the witness in that case was alive and might still have been examined by the plaintiffs, under a commission, if the defendant had not already had an opportunity to cross-examine him and neglected it. The examination in that case had been taken *de bene esse* in Chancery, upon a bill filed there to obtain the testimony of foreign witnesses to be used in Courts of law ; according to the practice which existed before the common law Courts were authorized by statute to issue commissions for that purpose. And what Lord Ellenborough said was in reference to the

rule of the common law in respect to receiving such depositions. The principle upon which depositions in Chancery, taken upon such a bill, were received by the common law Courts, was that they were the testimony of witnesses taken in another suit between the same parties; and that the witnesses being dead or out of the jurisdiction of the Court of common law, at the time of the trial there, their depositions in the former suit might be received in evidence, from the necessity of the case, in the same manner as if their testimony had been taken in a former suit between the same parties in a Court of common law. But as there was, in fact, no issue in the Court of Chancery upon which witnesses could be examined in the ordinary way in that suit, until the defendant had put in his answer, it was formerly doubted whether, by the rules of the common law, the depositions of a witness examined *de bene esse* in the Chancery suit, before answer, could be used in a Court of law; although the defendant had notice of such examination and an opportunity to attend and cross-examine the witness. (See *Howard v. Tremain* (1686), 4 Mod. Rep. 146; 1 Show. Rep. 363, and Carth. 265, *S. C.*; see also T. Raym. Rep. 335; Hard. Rep. 315; and Bull. N. P. 240.) In reference to this disputed question, Lord Ellenborough states the general rule of the common law upon the subject of evidence, to shew that it had no application to the question then under consideration, and that the depositions in that case taken *de bene esse* in Chancery, and duly published, might be read in the Court of law, although the defendant's answer had not been put in to the bill in Chancery. It is wholly improbable, therefore, that the learned Chief Justice of the Court of King's Bench, or any of his associate Judges who concurred in the decision in the case of *Cazenove v. Vaughan*, intended to express an opinion upon the question now under consideration; or even thought of such a case. What he states as the general rule of the common law, is one which admits of no doubt. And as the rules of evidence are or ought to be the same in all Courts, the same rule is equally

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Judgment. applicable to the Court of Chancery. But general rules are
Rose, J. subject to exceptions in particular cases, where the enforcement of the general rule might defeat the ends of justice. Thus, the dying declarations of a murdered person are received in evidence to prove the commission of the crime, notwithstanding the general rule that no evidence shall be admitted but what is or might be under the examination of both parties."

In the Court below the judgment of the Court was delivered by Nelson, C.J. (25 Wend. 651), and the rule laid down in *Cazenove v. Vaughan* was taken as governing the common law Courts, and the following reference was made to the decision in Chancery: "There are some cases in Chancery that would seem to conflict with this general principle of evidence; but they depend upon their own peculiar circumstances, and are admitted not to be binding upon the common law Courts."

In 1837, in the case of *Gass v. Stinson*, 3 Sumner's Rep. 98, it was held that a deposition may be admitted in equity, where the direct interrogatories have been fully answered, and death or some unavoidable accident occurs, which, without any fault on either side, prevents a cross-examination. Mr. Justice Story examines most of the cases to which I have referred, and says: "The general rule at law seems to be, that no evidence shall be admitted but what is or might be under the examination of both parties;" and after going through the authorities, both in common law and in equity, he concludes: "So that the general doctrine is far from being established in the manner which the argument for the defendant has supposed, and appears strongly to lead the other way."

The case of *Forrest v. Kissam*, in the Court of Errors, was considered in *The People v. Cole* (1871), heard at the general term of the Supreme Court at New York, reported in 43 N. Y. 508. The judgment of the Court was given by Grover, J., and was to the following effect: "It is error to suffer to go to the jury any evidence given by a witness on direct examination for the people, where by sudden

illness or by death of such witness, or other cause without the fault of and beyond the control of the prisoner, he is deprived of his right of cross-examination." The divergence of judicial opinion on the subject is explained in that case by the following statement, referring to the rule at common law discussed and followed in *Forrest v. KISSAM*, to which I have referred. The learned Judge said: "The rule of the civil law is different. In those countries where the latter system prevails, the testimony of witnesses is often taken in secret, and the party to be affected thereby often kept in ignorance of what it is until too late to controvert it by counter-testimony. The great superiority of the common law rule is obvious, and that should be adhered to, although in some cases there may be an apparent hardship. No injustice is done to the party seeking to avail himself of the evidence to require, that, before its admission, its truth shall be subjected to such tests as the experience of ages has shewn were necessary to render reliance thereon at all safe, and where this has been prevented without any fault of the adverse party, to exclude the evidence. *Forrest v. KISSAM* (*supra*) was reversed by the Court for the Correction of Errors (7 Hill 463). In the latter Court the Chancellor and two senators gave opinions to the effect that the testimony ought to be considered for what it was worth, although there had been no opportunity for cross-examination, the witness and the party introducing him being wholly free from fault. Some senators gave opinions for reversal, upon the ground that the party, by consenting to the adjournment at the close of the direct, had waived the right of cross-examination. Under these circumstances, it is impossible to determine upon what ground the reversal was placed by the majority of the Court, and the case is consequently no authority. The Chancellor cites some cases shewing that in Chancery the direct examination has been received where there has been no opportunity to cross-examine. The rule in Chancery is entitled to but little weight upon the inquiry as to what it is at common law, for the reason that the practice

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and rules in Chancery were to a great extent derived, not from the common, but from the civil law. The mode of examination of witnesses in Chancery was entirely different from that at common law."

I should have referred in order of date to ——— v. *Browne et al.* (1762), reported in Hardres 315. The following is the short report: "In ejectment for an estate of the Lord Cobham's in Kent, it was held upon evidence *per Curiam*, by advice of all the other Judges, whom one of the Barons was sent to consult, (*quod nota*), that if one witness be examined for the defendant, *de bene esse*, to preserve his testimony, upon a bill preferred, and before answer, and upon an order of Court for his examination, made upon hearing of counsel upon both sides; and if after answer the witness die before he be examined again, the answer coming in on the eighth and twentieth November, and the witness's death happening on the eighteenth of December following, and he being sick all the meantime, so that he could not go to be examined; that notwithstanding all this, the examination of such a witness should not be read in evidence, because it was taken before issue joined in the cause, and he might have been examined after: and the defendants did not appear to be in contempt." It will be observed that other considerations entered into this case than that of the bare question which is before us.

I have cited from these cases at length as giving the arguments pro and con in as succinct a form as I think can be found.

In Buller's *Nisi Prius* (1817), 242, it is stated as follows: "So where there cannot be a cross-examination, as depositions taken before commissioners of bankrupts, they shall not be read in evidence; yet if the witnesses examined on a coroner's inquest be dead, or beyond sea, their depositions may be read; for the coroner is an officer appointed on behalf of the public, to make inquiry about the matters within his jurisdiction; and therefore the law will presume the depositions before him to be fairly and impartially taken."

There are several cases before Lord Romilly in which evidence was admitted where there had been no opportunity for cross-examination. I refer to *Abadom v. Abadom* (1857), 24 Beav. 243, where an affidavit was made in favour of the plaintiff, who, after a long delay, filed it after the death of the witness, whereby no cross-examination could be had. The Master of the Rolls said: "There is no excuse for not filing the affidavit, it ought to have been filed before, but I am clear that I cannot take it off the file. When the matter comes before me, I shall, to say the least of it, certainly pay much less attention to it than to the other evidence."

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Rose, J.

In *Braithwaite v. Kearns* (1865), 34 Beav. 202, where an aged person had made an affidavit in the cause, and the opposite party had served the usual notice requiring him to be produced for cross-examination, but he was unable and incapable by reason of paralysis to attend and be cross-examined, the Master of the Rolls said: "I must allow it to be read, and must judge of it. But I pay little attention to the affidavit of a person who has not, when required, submitted to a cross-examination."

In *Ridley v. Ridley* (1865), 34 Beav. 329, where, after making their affidavit, and the defendant had given notice to cross-examine them, one deponent had died, and the other had become insane before they could be cross-examined, the Master of the Rolls gave liberty to use the affidavits, saving just exceptions. The Order under which the application was made was Order XIX. of the 5th February, 1861, which provided for the mode of cross-examining the party who had filed an affidavit, and proceeded: "And unless such deponent or witness be produced accordingly, such affidavit or examination shall not be used as evidence, unless by the special leave of the Court."

In *Davies v. Otty* (1865), 35 Beav. 208, where a witness made an affidavit and died four days afterwards, and before she could be cross-examined, her evidence was admitted at the hearing. The Master of the Rolls said: "I stated that I thought the evidence of Susannah Davies must be ad-

Judgment. mitted. It appears that her evidence was given on the
Rose, J. 28th August last year, and that she died two or three days
 afterwards, which made it impossible to cross-examine her;
 but there being no impropriety and nothing wrong in ex-
 amining her, and no keeping her out of the way to pre-
 vent a cross-examination, I must receive her evidence and
 treat it exactly in the same way that I should the evidence
 of any other witness who, from any cause whatever, either
 had not been cross-examined or whom it was impossible to
 cross-examine."

See also *Tanswell v. Scurrah* (1865), 11 L. T. N. S. 761, before the same learned Judge, where the plaintiff, whose evidence was of great importance to the issue, made an affidavit which was duly sworn and filed. He then died. No notice of the affidavit was given to the defendants, and they had not cross-examined the plaintiff upon it. The Court allowed the affidavit to be received at the hearing of the cause on motion for decree. The Master of the Rolls said: "I think, Mr. Russell, that the grounds upon which you rely for the rejection of the affidavit are not sufficient. It must be received by the Court; but an allowance is always made in favour of the defendants in such a case as this, and regard is had of the fact of no cross-examination being possible." He then referred to a recent case, probably the one just noted above.

In 1877 Hall, V.-C., in *Elias v. Griffith*, 46 L. J. N. S. Ch. 806, at the trial of a cause with *vivâ voce* evidence, admitted in evidence an affidavit filed upon an interlocutory motion which had been ordered to stand over to the hearing, although the deponent was since deceased, and had not been cross-examined. The learned Vice-Chancellor, in delivering judgment, said: "Part of the evidence tendered by the defendants * * was an affidavit made by Evan Pierce, for use on a motion for injunction, Pierce having since died. I admitted the affidavit *de bene esse*, and having since considered the question of its admissibility, I have come to the conclusion that it was admissible. In doing so I have read and considered the

case of *Lawrence v. Maule* (1859), 4 Drew. 472, and the cases collected in *Taylor on Evidence*, 455. I understand this affidavit to have been made for the purpose of a motion. The deponent might have been cross-examined upon it, which is the ordinary test of admissibility of a deposition made in the cause by a deceased witness. All the defendants to the lastly amended bill were then parties to the suit. Of course, in estimating the value of such evidence, the Court must consider that the deponent might, but for his death, have been cross-examined; and in the case of a deposition made for the purpose of a motion, whether the non-cross-examination may or may not be wholly or to some extent attributed to the object and materiality of the motion, and to the opportunity which it might be considered would be afterwards afforded for cross-examination." This decision, it will be seen, also depends upon its particular facts, but I cite it for the observations of the learned Judge.

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Rose, J.

I refer to the following text writers: *Greenleaf on Evidence*, 16th ed., par. 554; *Wharton's Criminal Evidence*, 8th ed., par. 227; *Starkie's Law of Evidence*, 4th ed., pp. 408, 418, and 34; and *Phipson's Law of Evidence*, 2nd ed., p. 478.

The People v. Cole (1871), 43 N. Y. 508, is cited by the last named text-writer in company with *Rex v. Doolin*, *supra*, as authority for the proposition, "where the witness dies or falls ill before cross-examination, his evidence will be admissible, though its weight may be slight." As will be seen from the citation above given, it is an authority against rather than in favour of such proposition.

In our own Courts the question has been incidentally referred to in *Erdman v. Town of Walkerton* (1893-4), 20 A. R. 444 and 23 S. C. R. 352. But, as will be observed by reference to the reports, the point now under discussion was not there for decision, and the case cannot be said to afford much assistance in coming to a conclusion upon the question raised here.

In *Taylor's Law of Evidence*, 9th ed., the cases are

Judgment. referred to in paragraphs 464-9, under the head of
Rose, J. secondary evidence or oral testimony, and paragraph 1469, under the head of death or illness of a witness under examination. Under the latter paragraph the cases cited are *Rex v. Doolin*, *Davies v. Otty*, *Elias v. Griffith*, *supra*. And in such paragraph the author states the law to be as follows: "In the event of the death or serious illness of a witness between his examination in chief and his cross-examination, in Ireland the majority of the Judges have in a criminal case, and in England both the late Master of the Rolls (Lord Romilly) and a late V.-C. (Hall) have in a civil case, held that the evidence previously given by him is admissible, though the degree of weight to be attached to it is of course a question of fact."

In view of the state of judicial opinion, and in the absence of any direct and positive ruling at law on the point, I think I must determine this question as best I can upon what seems to me to be principle.

I think that I shall perhaps be doing wisely in following the opinion of the majority of the Court in *Rex v. Doolin* (1832), *Jebb C. C. 123*, and I am persuaded to this course largely by the illustration used by those who thought that the evidence should be retained, as stated on p. 128, "That to establish such a rule as the withholding of the evidence in this case, would not only be mischievous to the public, but might be prejudicial to the prisoner; for it would follow from it (as was admitted by those who have contended for such a rule), that if a witness for a prisoner after concluding his direct examination, were to die before cross-examination, and his direct evidence were to be expunged in consequence, the prisoner would be deprived of evidence which might have produced an acquittal." The learned Judges thought and stated "that the course pursued in Courts of equity, where a witness died after his direct examination, and before cross-examination, was applicable to this case; the depositions in such case are read, the Court taking into its consideration the circumstance that there had not been a cross-examination."

I am unable to see any distinction in principle between admitting an affidavit or a deposition where there has been no opportunity of cross-examining, and retaining evidence which has been given in chief without an opportunity to cross-examine. The practice governing the admission of affidavit evidence and depositions may, in a sense, be said to be distinct from that governing the admission of oral testimony, but the difference is in favour of the retention of the oral testimony. It is given in open Court before the Judge and jury, or the Judge alone, under the careful supervision of the Court, and it may be presumed that no improper questions will be permitted. It was good evidence when received and must remain upon the record to affect the mind of the Judge or jury, as the case may be, unless expunged. It seems to me that the inconvenience of expunging it or withdrawing it from consideration would be much greater than any possible hardship that might ensue from retaining it.

Upon the whole, therefore, I am of the opinion that the evidence in this case must be retained and considered by the referee in determining the questions referred to him.

The appeal will be allowed with costs in the cause to the defendant in any event.

[An appeal to a Divisional Court is pending.]

E. B. B.

Judgment.

Rose, J.

[DIVISIONAL COURT.]

SMITH V. ROGERS ET AL.

*Company—Shares—Blank Transfer—Fraud—Usage of Stock Exchange—
Bonâ Fide Holder for Value—Validity.*

The registered owner of shares in a company gave to her brokers, for the purpose of selling the shares, the certificate of ownership upon the face of which the shares were stated to be transferable on the books of the company in person or by attorney upon surrender of the certificate and upon which was indorsed a transfer and power of attorney, signed by her, and having a blank left for the name of the transferee. The brokers improperly deposited the certificate as security for advances to them with a bank, who received it in the ordinary course of business without any notice of the owner's rights. There was evidence at the trial that, according to the usages of the stock exchanges of Ontario and Quebec, such a share certificate so endorsed passes from hand to hand and is recognized as entitling the holder to deal with the shares as owner and pass the property in them by delivery, or to fill in the blank with his own name and have the shares so registered on the books of the company :—

Held, that the bank was entitled to hold the shares as against the owner. *France v. Clark* (1884), 26 Ch. D. 257, distinguished.
Decision of FALCONBRIDGE, J., at the trial, reversed.

Statement.

THIS was an appeal from a judgment of FALCONBRIDGE, J., in an action brought by the owner of shares in certain incorporated companies against a firm of brokers, to whom she had intrusted the custody of her share certificates, and a bank to which the brokers had transferred the certificates as security for an advance to themselves.

The action was tried at the Ottawa Assizes on January 19th and 20th, 1898, before FALCONBRIDGE, J., without a jury.

Aylesworth, Q.C., and *G. M. Greene*, for the plaintiff.
O'Gara, Q.C., and *Wm. Wyld*, for Molsons Bank.

Judgment was given by consent against the defendants Rogers and Hubbell, the brokers, but was reserved as against the bank.

April 13th, 1898. FALCONBRIDGE, J.:—

Judgment.

Falconbridge,
J.

I find as a fact that the plaintiff is mistaken when she denies the signature to the indorsement of the Montreal Street Railway certificate.

But the result of the recent English authorities is to establish the plaintiff's right to recover against the bank, and there will be judgment against the bank accordingly with costs.

Judgment against Rogers and Hubbell in terms of consent filed.

I refer to Lindley's *Law of Companies*, 5th ed., p. 475 *et seq.*; *France v. Clark* (1884), 26 Ch. D. 257; *Williams v. Colonial Bank* (1887), 36 Ch. D. 659, (illustrating the difference of the American law) *S. C.* (1888), 38 Ch. D. 388; *The Colonial Bank v. Cady* (1890), 15 App. Cas. 267; *Fox v. Martin* (1895), 64 L. J. Ch. 473; *The London & Canadian Loan & Agency Co. v. Duggan*, [1893] A. C. 506; *Société Générale De Paris v. Walker* (1885), 11 App. Cas., at p. 29; *Rumball v. The Metropolitan Bank* (1877), 2 Q. B. D. 194; *Lewis v. Clay* (1897), 14 Times L. R. 149.

From this judgment the defendants the Molsons Bank appealed, and the appeal was argued on the 9th of September, 1898, before a Divisional Court composed of MEREDITH, C.J., ROSE and MACMAHON, JJ.

Geo. F. Henderson, for the appeal. The plaintiff had signed the transfers indorsed on the back of the share certificates with the name of the transferee in blank, and had given an irrevocable power of attorney to fill in the name and had left the certificates with her brokers, Rogers and Hubbell. The evidence shews that by the custom of the stock exchanges in Ontario that entitles the holder of the certificates to pass the property in them by delivery, or to fill in his own name or that of any one else and have the shares registered in the books of the companies. The plaintiff, by her conduct in indorsing and

Argument. leaving the certificates with Rogers and Hubbell is estopped from denying their transferability: *Goodwin v. Roberts* (1876), 1 App. Cas. 476. The plaintiff, *being the owner*, is bound by the act of her brokers, even although fraudulent as against her: *per* Lord Watson in *Colonial Bank v. Cady* (1890), 15 App. Cas., at p. 278. Most of the cases relied upon by the trial Judge are distinguishable from this because the custom was not proved as it was here. In *Fox v. Martin* (1895), 64 L. J. Ch. 473, there was no power of attorney. When the number of shares being pledged is small, as here, it would not raise suspicion as it might in cases where brokers pledge a large number of shares *en bloc*, the latter being probably the property of customers: *The London Joint Stock Bank v. Simmons*, [1892] A. C. 201. The certificates are the evidence of title: *Société Générale De Paris v. Walker* (1885), 11 App. Cas., at p. 29. I refer also to *The London & Canadian Loan & Agency Co. v. Duggan*, [1893] A. C. 506; *Rumball v. The Metropolitan Bank* (1877), 2 Q. B. D. 194; *Hone v. Boyle, Low, Murray & Co.* (1891), 27 L. R. Ir. 137; *Waterhouse v. Bank of Ireland* (1892), 29 L. R. Ir. 384.

Aylesworth, Q.C., *contra*. The judgment is right and the plaintiff must succeed, as the law is correctly enunciated in *France v. Clark* (1884), 26 Ch. D. 257; and the cases decided subsequently do not turn on any custom. In *France v. Clark*, there was an absence of evidence of mercantile usage. In *Colonial Bank v. Hepworth* (1887), 36 Ch. D. 36, usage or practice was not allowed to make or control the law. In *Williams v. Colonial Bank* (1887), first reported in 36 Ch. D. 659, notwithstanding the evidence at the trial, the Court of Appeal (1888), 38 Ch. D. 388, and House of Lords (1890), 15 App. Cas. 267, reversed the judgment in favour of the bank and it did not appear that if the owner had been alive the judgment would have been different. Although the plaintiff here did sign one transfer with instructions to sell when the stock arrived at a certain figure, she never intended to sign even a transfer of the other stock, and there was no authority

Argument.

to pledge the shares. The words of the form of transfer gave no power to pledge, the words in the one case being "sell, assign and transfer," and in the other "sell, assign, transfer and make over." The purchaser acquires no better title than the vendor has unless the owner is estopped from denying the title: Lindley's Law of Companies, 5th ed., 475. A purchaser dealing with a broker who exceeds his authority and obtains a blank transfer from him obtains no better title than the broker is authorized to transfer: Lindley, 480. In *Waterhouse v. Bank of Ireland* (1892), 29 L. R. Ir. 384, the broker was authorized to obtain a loan. The evidence here shews the bank manager never knew these brokers to have any stock of their own up to the time they pledged the first certificate, and the second was taken by the bank as a security for an antecedent debt. The evidence of custom given was not of the custom of business men or of the business community, but of the bank only, which is not sufficient. Estoppel cannot arise, as the bank is secured by a guarantee and will not lose anything in any event. See also Buckley on Companies, 7th ed., 489.

Henderson, in reply. In *Colonial Bank v. Hepworth* (1887), 36 Ch. D. 36, the greater equity prevailed.

January 7, 1899. MEREDITH, C.J.:—

The proper conclusion upon the evidence is, I think, that according to the usage of the stock exchanges in Ontario and Quebec and the course of dealing in or with shares such as those in question in this case, a share certificate indorsed with a transfer and power of attorney, signed by the person named in the certificate as the owner of the shares, having a blank left for the name of the transferee and attorney, passes from hand to hand and is recognized and treated as entitling the holder of the certificate, so indorsed, to deal with the shares as owner of them and to pass the property in them by delivery of the certificate, so indorsed, or to fill in the blanks with his own name and

Judgment. to cause the shares to be so registered on the books of the
Meredith, company.
C.J.

The evidence upon this point was not very strong, but being uncontradicted was sufficient to justify this conclusion.

The question of law which arises on this state of facts is as to the right of the appellants, who received the certificates in question from the defendants Rogers and Hubbell in the ordinary course of business for value and without notice of the plaintiff's rights, to retain them against her, although the dealing with the certificates by the defendants Rogers and Hubbell, was, as between them and the plaintiff, an unauthorized dealing with and fraudulent appropriation to their own use of the plaintiff's property.

My brother Falconbridge, by whom the action was tried, decided apparently on the authority of *France v. Clark* (1884), 26 Ch. D. 257, that the appellants were not entitled to hold the certificates as against the plaintiff, and that they had acquired no title to them or to the shares, and gave judgment for the plaintiff accordingly.

Since the decision in *France v. Clark*, the question of the rights, as against the true owner, of a transferee who obtains the documents of title under such circumstances as exist in this case has been considered in several cases.

In *Colonial Bank v. Hepworth* (1887), 36 Ch. D., at p. 44, Mr. Justice Chitty, referring to a practice similar to that which I have said is in this case proved to exist, says: "The plain legal effect of this recognized practice is, that the transferor who executes the transfer in blank confers on the holder of the documents for the time being an authority to fill in the name of the transferee; and each successive holder for the time being, when the documents pass through several hands, passes on this authority."

In *The Colonial Bank v. Cady* (1890), 15 App. Cas. 267, the same question was under consideration by the House of Lords. The question to be decided was as to the right of two banks to hold as against the plaintiffs, the executors of one J. M. Williams, certain shares in the New York Central and Hudson River Railroad Company.

Williams, who was the registered owner of the shares had died, and the plaintiffs, who were his executors, desiring to have the shares transferred to their own names, sent the certificates to their London brokers for that purpose, having previously signed as executors blank transfers and powers of attorney which were endorsed upon them. The brokers in fraud of the executors delivered certain of the certificates to the Colonial Bank as security for advances, and certain others of them they pledged to the London Chartered Bank of Australia as security for a loan. The executors having discovered the frauds brought actions against the two banks to establish their title to the shares and to restrain the banks from dealing with the shares held by them respectively. A practice similar to that referred to by Mr. Justice Chitty prevailed with regard to the mode of dealing with the shares, and it was contended by the banks that having obtained the certificates in good faith and for value they were entitled to hold them as against the executors.

Judgment.

Meredith,
C.J.

The House of Lords held, affirming the decision of the Court of Appeal (1888), 38 Ch. D. 388, that the title of the executors could be defeated only upon the principle of estoppel, and that there was no estoppel on the facts of that case, because the possession of the certificates, indorsed as they were, was consistent either with their having been entrusted to the brokers to sell, or with their having passed into their hands in order to have the names of the executors entered in the register of the shareholders as owners of the shares mentioned in the certificates; and that being so the banks were put upon inquiry as to which of these two purposes was that for which the brokers were entrusted with the certificates.

Lord Herschell and Lord Watson in their speeches expressed in clear and unambiguous language the opinion, that had the transfers been executed by Williams himself and the certificates sent by him to the brokers for safe custody, the brokers though acting fraudulently would have, nevertheless, been placed in a position to give a title to an

Judgment.
Meredith,
C.J.

honest purchaser which Williams could not dispute. As put by Lord Watson on pp. 277, 278, delivery of the certificate with the transfer executed in blank by the registered owner passes, not the property of the shares, but a title, legal and equitable, which enables the holder to vest himself with the shares without risk of his right being defeated by any other person deriving title from the registered owner; and again at p. 280, Lord Watson said, "When the registered shareholder executes the transfer indorsed on his certificate, he can have only one intelligible purpose in view, that of passing on his right to a transferee."

In *Hone v. Boyle, Low, Murray & Co.* (1891), 27 L. R. Ir. 137 & 151, the view expressed by Lord Herschell and Lord Watson, to which I have referred, was adopted and given effect to by the Court of Appeal in Ireland and it was recognized in *Waterhouse v. Bank of Ireland* (1892), 29 L. R. Ir. at p. 394, as a correct statement of the law.

Mr. Justice Kekewich, however, in *Fox v. Martin* (1895), 64 L. J. N. S. Ch. 473, declined to adopt this view of the law which he thought was inconsistent with *France v. Clark*.

It is, I think, not impossible to reconcile *France v. Clark*, with the opinions of Lord Herschell and Lord Watson in *Colonial Bank v. Cady*. In *France v. Clark*, there was no evidence of a mercantile usage to the effect that holders of certificates of the shares which were in question in that case, indorsed with blank transfers signed by the registered owners, were treated as having the right to transfer the shares mentioned in the documents, as if they were the owners of the shares, and not only was there no evidence of such an usage but, as the Lord Chancellor pointed out at p. 264, the inference was for the reasons which he mentions, rather, that no such usage could be shewn to exist. On the other hand, the basis on which the opinions of Lord Herschell and Lord Watson rested was, that in the case with which they were dealing such a mercantile usage or recognized practice, as Mr.

Justice Chitty calls it (which I take to mean the same thing), was proved to exist.

However this may be, the weight of judicial opinion and the reason of the thing appear to me to justify us in holding that the law is, as it is stated by Lord Herschell and Lord Watson to be, and I am the more ready to so hold because the adoption of the opposite view would, in my judgment, seriously impede the rapid carrying on of a large branch of commercial business, to the successful carrying on of which in these modern days celerity of despatch in its transaction is essential.

The appeal should in my opinion be allowed with costs, and the action, as against the defendants the Molsons Bank, be dismissed with costs.

MACMAHON, J.:—

The plaintiff by a share-certificate, dated 31st January, 1895, became the owner of five shares of the stock of the Commercial Cable Company, of the par value of \$100 per share, which is "transferable only on the books of the company in person, or by attorney duly authorized on the surrender of this certificate." On the back of the certificate there is a blank form of transfer of the shares mentioned in the certificate, and an irrevocable power of attorney to transfer the stock on the books of the company. This transfer and power of attorney which the plaintiff admits having executed, is dated the 28th April, 1897. The certificate with the transfer so endorsed in blank, the plaintiff states she left with the firm of Rogers and Hubbell, stockbrokers, at Ottawa, to sell the stock for her when it reached 175.

By a certificate dated 14th June, 1897, the plaintiff became the owner of ten shares of the stock of the Montreal Street Railway Company, of the value of \$50 each, transferable on the books of the company in person or by attorney upon surrender of the certificate. There is endorsed on this stock certificate an assignment and

Judgment.

Meredith,
C.J.

Judgment. transfer in blank, dated 18th June, 1897, which the trial
MacMahon, Judge has I think properly found, as against her want
J. of recollection of having signed it, that the plaintiff did
sign it.

The plaintiff occasionally dealt in a small way in stocks, and prior to the transaction out of which the present litigation arose, was the owner of ten shares of Canadian Pacific Railway stock, which she had sold through Rogers and Hubbell, and had endorsed on the certificate a transfer of the C. P. R. shares somewhat similar to the transfers of the shares in question.

The defendant Rogers took very little part in the management of the brokerage business, which was almost exclusively conducted by Hubble, in whom the plaintiff said she had confidence.

Hubble, on the 11th May, 1897, procured from the defendants the Molsons Bank at Ottawa, where the firm of Rogers and Hubbell kept their account, a discount of the firm's note for \$1,350, payable in one month, and as security for such discount gave the bank the certificate for the five shares of Commercial Cable stock endorsed in blank as already stated. In addition thereto the bank took from Rogers and Hubbell an independent assignment hypothecating these five shares of Commercial Cable stock, together with other shares of stock, as collateral security for the payment of the note so discounted, or any renewals, or part renewals, of the same, and also as collateral security for all other indebtedness of the firm to the bank. The assignment represents that these five shares of Commercial Cable are "in favour of Georgina Smith."

When Hubble came to get this particular discount, he told Mr. Brodrick, the manager of the bank (according to the latter's evidence), that he owned the five shares of Commercial Cable, as well as the other shares of Commercial Cable standing in the name of one Nicholson.

On the 14th June, the day the \$1,350 note matured, the bank debited Rogers and Hubbell's account with the amount,

and on the following day an advance of \$150 was made by the bank, and a note for \$1,500, representing the \$1,350 and the \$150, was discounted and the proceeds placed to the credit of the firm. There was a further renewal of this note on the 17th July at one month, and an endorsement appears thereon, dated August 3rd, 1897, crediting \$351, being the proceeds of the two shares of Commercial Cable mentioned in the hypothecation sheet as standing in the name of V. C. Nicholson. Neither in June nor in July was there any further bargaining, nor any fresh assignment taken at the time either of the above renewals was given.

Judgment.
MacMahon,
J.

Mr. Brodrick's account of the transaction relating to the transfer of the shares of Montreal Street Railway stock is that two or three days prior to the 15th July, 1897, the firm of Rogers and Hubbell was allowed an overdraft of \$1,000, and Hubbell left the certificate there as security for such overdraft; and on the 17th a note of Rogers and Hubbell for \$1,000 was discounted and the proceeds placed to their credit; and an assignment of this railway stock was taken on the 17th July as collateral security, containing terms similar to those in the assignment of the Commercial Cable stock.

Hubbell absconded to the United States on the 19th July, and has, as far as known, never been in Canada since that date.

Judgment was entered by consent for the plaintiff against the defendants Rogers and Hubbell. Falconbridge, J., reserved judgment as to the issues raised by the defendants, the Molsons Bank, and he afterwards directed judgment to be entered for the plaintiff against the bank.

Daniels, in his work on Negotiable Instruments, 4th ed., designates such stock certificates as those in question here as *quasi* negotiable instruments, and says, section 1708 g: "Commercial corporations generally encourage the assignment of their shares, as their value is increased by the facility of transfer; and it is generally provided on the face of their certificates of stock by virtue of their char-

Judgment. ters, by-laws, or regulations, that the shares 'are transfer-
MacMahon, able on the books of the company, in person or by
 J. attorney, on the surrender of this certificate.' And on
 the back of the certificates there is generally a printed
 form of sale and assignment, with an irrevocable power of
 attorney in blank, authorizing the unnamed person to do
 all things requisite to perfect the transfer on the books of
 the corporation. When such formal assignment, and power
 of attorney in blank, is signed by the shareholder, and the
 certificate is delivered therewith, an apparent ownership
 in the shares represented is created in the holder. And
 the general principle sustained by the great weight of
 authority, as well as of reason, is that when the owner of
 a certificate of stock with such a power of attorney in
 blank thereon written, or thereunto attached, entrusts it
 to an agent with power to deal therewith, a *bonâ fide*
 purchaser for value without notice will be protected in his
 acquisition of the certificate, although the agent to whom
 it has been entrusted has diverted it from the purposes
 for which it was put in his charge, or has been guilty of a
 fraud or breach of trust in reference thereto. This doc-
 trine does not rest upon the idea that the certificate of
 stock is a negotiable instrument; but upon the equitable
 principle that where a person confers upon another all the
 indicia of ownership of property, with comprehensive
 and apparently unlimited powers in reference thereto, he
 is estopped to assert title as against a third person, who,
 acting in good faith, acquires it for value from the appar-
 ent owner."

The statement as to the law in the United States enun-
ciated in the text, is fully borne out by the case in the
Supreme Court of the State of New York, of *The Com-
mercial Bank of Buffalo v. Kortright* (1839), 22 Wend.
348, and by the Supreme Court of Pennsylvania in *Wood's
Appeal*, *Wood v. Smith* (1880), 92 Penn. 379, and in *Burton's
Appeal* (1880), 93 Penn. 214, and in a number of other cases
decided by Courts in other States of the Union, referred to
in Mr. Daniels' work.

The mode of transfer of these stock certificates, with blank endorsements, is the same both in England and the United States. The usual method of transfer in England is thus stated by Chitty, J., in *Colonial Bank v. Hepworth* (1887), 36 Ch. D., at p. 44: "According to a practice which has extensively prevailed, and has been recognized and acted upon by the company, the transferor signs the transfer and power of attorney without filling in the names of the transferee and attorney; and these blank transfers readily pass on the market from hand to hand by delivery only until the documents reach the hands of some holder who desires to be registered. His name is then filled in by himself or on his behalf. The documents are then left with the company, the certificates are cancelled, the transferee is registered, and new certificates in his name are issued in the manner already described."

Judgment.
MacMahon,
J.

"The plain legal effect of this recognized practice is, that the transferor who executes the transfer in blank confers on the holder of the documents for the time being an authority to fill in the name of the transferee; and each successive holder for the time being, when the documents pass through several hands, passes on this authority. The holders must of course be *bonâ fide* holders for value without notice." See also the judgment of Lord Watson in *The Colonial Bank v. Cady* (1890), 15 App. Cas., at p. 277.

Therefore, once the owner of a share certificate signs a transfer and power of attorney in blank, the stock-certificate may pass from hand to hand through any number of transferees; so that having regard to such practice the designation given to them by Daniels of *quasi* negotiable instruments is not inappropriate. And accordingly in the United States such certificates with a transfer in blank, signed by the holder and given to his broker to be dealt with by him, although the latter be guilty of fraud in dealing with it, the doctrine of estoppel being invoked protects a *bonâ fide* purchaser or pledgee for value without notice of the fraud.

Judgment.

MacMahon,
J.

In England the estoppel created by the execution of such a blank transfer by the owner of stock has, in one instance, been described as a limited one. In the case already referred to, of *Colonial Bank v. Hepworth* (1887), 36 Ch. D., at pp. 53, 54, Chitty, J., said: "Estoppels cannot be manufactured arbitrarily; no estoppel can be raised on a document inconsistent with the terms of the document itself. What, then, is the estoppel here? Having regard to the practice proved and the condition in which these documents are when they pass from hand to hand, the right principle to adopt with reference to them is to hold that where (as is the case before me) the transfers are duly signed by the registered holders of the shares, each prior holder confers upon the *bonâ fide* holder for value of the certificates for the time being an authority to fill in the name of the transferee, and is estopped from denying such authority; and to this extent, and in this manner, but not further, is estopped from denying the title of such holder for the time being. By the delivery an inchoate legal title passes, but a title by unregistered transfer is not equivalent to what has been termed 'the legal estate' in the shares or to the complete dominion over them. Had the plaintiffs filled in their own names or the name of some nominee of their own in the blank transfers while in their possession, the case would have stood differently."

But Lord Watson in *The Colonial Bank v. Cady* (1890), 15 App. Cas. 267, holds that the legal title passes under the circumstances stated by Chitty, J. He says, at pp. 277, 278: "The appellants' witnesses say that delivery of the certificates with the transfer executed in blank, 'passes the property' of the shares; but that statement must be accepted subject to the explanations by which it is qualified." * * "It would, therefore, be more accurate to say that such delivery passes, not the property of the shares, but a *title legal* and *equitable*, which will enable the holder to vest himself with the shares without risk of his right being defeated by any other person deriving title from the registered owner." And that was what was held

by Sir George Jessel, M.R., in *In re Tahiti Cotton Co.*, *Judgment. Ex p. Sargent* (1874), L. R. 17 Eq. 273.

MacMahon,
J.

In *Colonial Bank v. Hepworth* (1887), 36 Ch. D. 36, the circumstances were peculiar. The stock had been bought in August and October, 1883, for the defendant, by Thomas & Co., who received the certificates from the persons from whom the shares were bought. The defendant allowed Thomas & Co. to retain the shares for the purposes of registration. In November, Thomas & Co., in fraud of the defendant, deposited the share certificates with the plaintiffs to secure the balance then due to them. The certificates had been executed by the person or firm in whose names the shares were registered as transferors; the name of the transferee and proposed attorney being in each case left in blank. On the 11th of December, Thomas & Co. obtained from the plaintiffs the certificates on the representation that they desired to send them for registration. When received, Thomas & Co. filled in the name of the defendant in the blank transfer forms, and the stock was registered in the books of the company in his name. Thomas & Co., when they handed the certificates to the company to be registered, obtained a receipt for the same, which they sent to the plaintiffs, which they retained until February, 1884, when, learning that a partner of Thomas & Co. had absconded, they sent to the agents of the company the receipt and obtained the new certificates which had been issued in defendant's name.

The plaintiffs claimed a declaration that the shares were theirs. But it was held that the defendant was the legal owner; the share certificates being in his name, and being delivered to the Colonial Bank in error, and that the defendant was entitled to have such new certificates delivered to him.

Mr. Justice Chitty puts the position of the plaintiffs and defendants respectively in regard to the certificates in this way, at p. 54:—

“Had the plaintiffs filled in their own names or the name of some nominee of their own in the blank transfers

Judgment.
MacMahon,
J.

while in their possession, the case would have stood differently; the defendant would not have been registered as the holder of the shares. As it is, the plaintiffs never had a present absolute unconditional right to register. Their inchoate title was liable to be defeated, and has been defeated by the defendant acquiring in good faith for value a complete legal title by transfer filled in with his name as transferee and by registration."

It is hardly necessary to refer to *Goodwin v. Roberts* (1876), 1 App. Cas. 476, and *Rumball v. The Metropolitan Bank* (1877), 2 Q. B. D. 194, which were cited during the argument, because in both of these cases the scrip certificates were held to be negotiable instruments.

In the *Goodwin* case the scrip was that of a foreign Government, and it was admitted by the special case submitted for the opinion of the Court that, by the custom of all stock exchanges in Europe, they were negotiable instruments and passed by mere delivery to a *bonâ fide* holder for value, and as English law follows the custom, any person taking it in good faith obtained a title to it independent of the title of the person from whom he took it.

The decision in *Rumball v. The Metropolitan Bank* followed the judgment in *Goodwin v. Roberts*.

The decision in the case in hand must, therefore, turn on whether *France v. Clark* (1884), 26 Ch. D. 257, is still a binding authority, or whether it has not virtually been reversed by *The Colonial Bank v. Cady* (1890), 15 App. Cas. 267.

The head-note to *In re Tahiti Cotton Co., Ex p. Sargent* (1874), L. R. 17 Eq. 273, which sets out the facts sufficiently for our present purpose, states:—

"Where the owner of shares borrows money and deposits with the lender certificates of his shares, and also transfers thereof signed by him, but with the date and name of the transferee left blank, the lender has implied power to fill up the blanks, and the transfers will pass the legal interest if the articles of association do not require a deed; otherwise only an equitable interest."

That case was dissented from by the Court of Appeal in *Judgment.*
France v. Clark (1884), 26 Ch. D. 257, in which a summary of the facts and an epitome of the judgment of the Court *MacMahon*
 delivered by Lord Chancellor Selborne is contained in *J.*
 the following paragraphs of the head-note: "France, the registered holder of shares in a company, deposited the certificates with Clark as security for £150 and gave him a transfer signed by France, with the consideration, the date, and the name of the transferee left in blank. Clark deposited the certificates and the blank transfer with Quihampton as security for £250. Clark died insolvent, after which Quihampton filled in his own name as transferee, and sent in the transfer for registration. The shares were accordingly registered in Quihampton's name, but whether this was done before notice given by France to the company and to Quihampton that France denied the validity of the transfer, was doubtful on the evidence:—

"*Held*, affirming the decision of Fry, J., that Quihampton had no title against France except to the extent of what was due from France to Clark."

Lord Selborne, in effect, said: "A person who, without inquiry takes from another an instrument signed in blank by a third party, and fills up the blanks, cannot, even in the case of a negotiable instrument, claim the benefit of being a purchaser for value without notice, so as to acquire a greater right than the person from whom he himself received the instrument.

"If a debtor delivers to his creditor a blank transfer by way of security, that does not enable the creditor to delegate to another person authority to fill it up for purposes foreign to the original contract."

And the Lord Chancellor, referring to *In re Tahiti Cotton Co., Ex p. Sargent* (1874), L. R. 17 Eq. 273, said at p. 264:—

"The case of *Ex p. Sargent* was upon an application to rectify the register of a company by substituting the name of Sargent for that of Fry, who, being the registered owner of certain shares, had signed a transfer in blank to Cannon,

Judgment. by way of security ; and Cannon had transferred it in the same state to Sargent, who afterwards filled in his own name. Sargent does not appear to have claimed to stand as more than a transferee, with a right to get in the legal title, of such interest as Cannon had when he handed over the documents, and the Master of the Rolls relied upon the power of every mortgagee 'to reborrow and to transfer his security.' There were several communications between Fry and Sargent after the transfer, which may, perhaps, have been thought to amount to ratification ; and the Master of the Rolls said that Mr. Fry's own counsel had admitted Sargent's equitable right to have the shares transferred to him, which admission, in his Lordship's judgment, covered the legal right also. If the case is to be thus explained, it is not an authority in point on the present occasion ; if not, we should not be prepared to follow it."

MacMahon,
J.

In that case Cannon had filled up the blank transfer with his own name and sent it to the company for registration, but Fry, being the chairman of the board of directors, induced the company not to register the transfer. Sir George Jessel said, at p. 280 (L. R. 17 Eq.): "As I have already said, I hold there was authority to fill up the blanks over the signature of Mr. Fry, and therefore they were validly signed, and I think ought to have been registered." He, in effect, was holding that the legal title to the shares was in Cannon.

Williams v. Colonial Bank (1888), 38 Ch. D. 388, was before the House of Lords *sub nomine The Colonial Bank v. Cady* (1890), 15 App. Cas. 267, the facts of which are set out with sufficient fullness in the head-note: "The registered owner of shares in a New York company held certificates which stated that the shares were held by him and were transferable in person or by attorney on the books of the company only on the surrender and cancellation of the certificate by an indorsement thereof. The indorsement was in the form of a transfer for value received, blank in the names of the transferor and transferee,

with a power of attorney in blank to carry out the transfer. On the death of the owner his executors obtained probate of his will, and in order that the shares might be registered in their own names, signed as executors the transfers on the back of each certificate, without filling up the blanks, and sent the certificates to their broker, who fraudulently deposited the certificates with a bank, which took them *bonâ fide* and without notice as security for advances. The bank retained the certificates and took no steps to obtain registration. By the law of New York such a delivery of signed transfers by the registered owner of shares would estop him from setting up his title against a purchaser for value without notice. But neither on the New York nor on the London Stock Exchange are transfers so signed by executors treated as being in order, or received as sufficient security for advances, unless duly authenticated."

Judgment.

MacMahon
J.

The House of Lords was unanimous in affirming the judgment of the Court of Appeal (1888), 38 Ch. D. 388, on the points decided by the Lords Justices, namely, that the particular documents in question were not negotiable instruments; and that the executors were not estopped by what they had done in signing the transfers in blank, nor by having left the documents with the brokers for a considerable time, from denying the title of the Colonial Bank: Lindley's Law of Companies, 5th ed., p. 482.

In that case the share certificates were in the name of the original owner of the stock, J. M. Williams, while the transfers endorsed on the certificates were signed by the executors and without being duly authenticated by a consul were "not in order" for registration in the books of the company, and, therefore, business men would not take them without enquiry. The defect existing in the documents was one which should have put the Colonial Bank on enquiry before accepting the certificates.

Lord Chancellor Halsbury in his judgment at p. 272, said: "It is admitted that the shares (or to speak more accurately the share certificates) are not negotiable instru-

Judgment. ments, and the executors being informed that in order to
MacMahon, get themselves registered in the books of the company
J. they must sign their names at the end of the document
acted upon that assurance, and, as I have said, entrusted
the possession of the share certificates (never intending to
part with the property in them) to Blakeway. Blakeway
was a stock broker in London, and the transaction of loan
took place in London; but the shares in question are
shares in a corporation established in New York and
subject to the laws of that State."

Lord Watson's observations, coupled with those of Lord Herschell, from whose judgment I shall presently quote, are of the utmost import in dealing with the case in hand. Lord Watson says, at p. 277: "In so far as the law of America is concerned, your Lordships have the aid of three experts, two of whom were examined by the appellants and one by the respondents. As I understand their evidence, the principles of American law do not differ in any way, or at least in any material respect, from those by which an English Court would be guided in similar circumstances. When the indorsed transfer has been duly executed by the registered owner of the shares, the name of the transferee being left blank, delivery of the certificate in that condition by him, or by his authority, transmits his title to the shares both legal and equitable. The person to whom it is delivered can effectually transfer his interest by handing his certificate to another, and the document may thus pass from hand to hand until it comes into the possession of a holder who thinks fit to insert his own name as transferee, and to present the document to the company for the purpose of having his name entered in the register of shareholders and obtaining a new certificate in his own favour."

And again at pp. 278, 279, he says: "Whether the respondents are estopped from saying that Blakeway had not their authority to dispose of the certificates in question is, in my opinion, the sole question presented for decision in these appeals. Had the transfers been executed by John Michael

Williams, and the certificates thereafter sent by him to Thomas, Sons & Co. for safe custody, I should not have hesitated to hold that Blakeway, though acting fraudulently, was nevertheless placed by his act in a position to give a title to an honest purchaser which his employer could not dispute. But that is not the case with which we have to deal. The transfer was signed by the respondents, who were not the registered owners of the shares and were not named in the certificate. Whatever may be the effect of an instrument so executed, one thing is clear, that it cannot be regarded as, either in law or by custom, equivalent to a certificate and transfer executed by the registered owner himself."

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MacMahon
J.

And, at p. 280: "When the registered shareholder executes the transfer indorsed on his certificate, he can have only one intelligible purpose in view, that of passing on his right to a transferee. It is not so in the case of an executor, whose only title to the shares is by legal assignment to the interest of the defunct."

Lord Herschell says, p. 285: "The evidence of the American lawyers, however, makes it equally clear that such certificates of shares are not in the United States, any more than in England, negotiable instruments. The mere delivery of them with the indorsed blank transfer and power of attorney signed, irrespective of any act or intent on the part of the owner of the shares, is not of itself sufficient to pass the title to them. If delivered by or with the authority of the owner with intent to transfer them, such delivery will suffice for the purpose. But if there has been no intent on the part of the owner to transfer them, a good title can only be obtained as against him if he has so acted as to preclude himself from setting up a claim to them. If the owner of a chose in action clothes a third party with the apparent ownership and right of disposition of it, he is estopped from asserting his title as against a person to whom such third party has disposed of it, and who received it in good faith and for value. And this doctrine has been held by the Court of

Judgment.

MacMahon

J

Appeals of the State of New York to be applicable to the case of certificates of shares, with the blank transfer and power of attorney signed by the registered owner, handed to him by a broker who fraudulently or in excess of his authority sells or pledges them. The banks or other persons taking them for value, without notice, have been declared entitled to hold them as against the owner.

“As at present advised, I do not see any difference between the law of the State of New York and the law of England in this respect. If in the present case the transfer had been signed by the registered owner and delivered by him to the brokers, I should have come to the conclusion that the banks had obtained a good title as against him, and that he was estopped by his act from asserting any right to them. But this is not the case with which your Lordships have to deal. The transfers in this case were not signed by the registered owner, John Michael Williams, but by his executors. If they had been so signed and delivered by the executors for the purpose of effecting a transfer, I see no reason to doubt that such a delivery would have been effectual for that purpose. But they were not.”

* * * * *

“The case seems to me to differ essentially from that of a transfer signed by the registered owner. He must, presumably, have signed it with the intention at some time or other of effecting a transfer. No other reasonable construction can be put on his act. And if he entrusts it in that condition to a third party, I think those dealing with such third party have a right to assume that he has authority to complete a transfer. But when the indorsement is signed by executors who are not the registered owners, there can be no such presumption. They may well have signed it merely to complete their title without the intention of ever parting with the shares.”

In *Fox v. Martin* (1895), 64 L. J. N. S. Ch. 473, the plaintiff, the registered owner of shares in a limited company, instructed a broker to sell the same, and for that

purpose delivered to him the share certificate and a blank transfer signed by the plaintiff. The broker improperly deposited the blank transfer and certificate with the defendant as security for his own debt. The defendant afterwards filled up the blank transfer with the date, consideration, and name of transferee, and sent it for registration to the office of the company, where it lay for more than a fortnight without being registered. The plaintiff brought his action to restrain registration and establish his right to the shares.

Judgment.
MacMahon,
J.

Kekewich, J., held, following *France v. Clark* (1895), 26 Ch. D. 257, that the defendant had acquired no title to the shares as against the plaintiff; and assigned as a reason for not following *The Colonial Bank v. Cady* (1890), 15 App. Cas. 267, that although these were expressions of opinion by the Lords inconsistent with *France v. Clark*, he considered that case as not being expressly overruled by it.

According to *France v. Clark* (1895), 26 Ch. D. 257, and *Fox v. Martin* (1895), 64 L. T. N. S. Ch. 473, where any owner of a share certificate executes a transfer in blank and hands it to his broker, the fact that such transfer is in blank affects an intending purchaser or pledgee with notice and puts him on enquiry as to the extent of the broker's authority.

France v. Clark was referred to by the appellants in *The Colonial Bank v. Cady* (1890), 15 App. Cas. 267, and although it is not expressly mentioned in any of the judgments of the Lords, it is impossible that it should not have been considered. For it must not be lost sight of that these opinions of Lords Watson and Herschell were expressed, although when the case then being considered was before the Court of Appeal, Lords Justices Cotton and Lindley, had delivered opinions in consonance with that of Lord Chancellor Selborne in *France v. Clark*, and the judgments of Lords Watson and Herschell deal with the very point upon which the decision in *France v. Clark* hinged; and what they enunciate as being the law is the

Judgment. very converse of that laid down in *France v. Clark*
MacMahon, and *Fox v. Martin*. For as already pointed out, Lord
J. Watson says, at p. 278: "Had the transfers been
executed by John Michael Williams, and the certificates
thereafter sent by him to Thomas, Sons & Co. for safe
custody, I should not have hesitated to hold that Blake-
way, though acting fraudulently, was nevertheless placed
by his act in a position to give a title to an honest
purchaser which his employer could not dispute." And
Lord Herschell, at p. 285, said: "If in the present case
the transfer had been signed by the registered owner and
delivered by him to the brokers, I should have come to
the conclusion that the banks had obtained a good title as
against him, and that he was estopped by his act from
asserting any right to them."

In *France v. Clark* and *Fox v. Martin*, according to
Lords Watson and Herschell, the transferees of the share
certificates in each of those cases would have a title by
estoppel, and that is what was held by Sir George Jessel,
M. R., in *In re Tahiti Cotton Co., Ex p. Sargent* (1874),
L. R. 17 Eq. 273, the judgment in which was dissented
from in *France v. Clark*.

The above short excerpts from the judgments of Lords
Watson and Herschell, in *The Colonial Bank v. Cady*, are
referred to in the judgment of North, J., in *Bentinck v. Lon-
don Joint Stock Bank*, [1893] 2 Ch., at p. 144, as illustrat-
ing what he regards as the settled law for his guidance in
dealing with the case then before him for decision. And
these extracts also appear in the judgment of FitzGibbon,
L.J., in the Court of Appeal, Ireland, in *Hone v. Boyle*
(1891), 27 L. R. Ir., at p. 171, who follows the opinions
expressed therein, saying at p. 169 of his judgment, "The
so-called 'estoppel' is the equitable effect of leaving a
person in the possession of the symbols of property, or of
the *indicia* of rights affecting property; and these certifi-
cates, as between mesne holders, are the absolute *indicia*
of an uncontrolled right and power of obtaining a transfer
of the shares which they represent." And Barry, L.J., in

the same case puts the question for consideration concisely at pp. 175, 176: "The question here is not whether these certificates are 'negotiable,' but whether their delivery to a *bonâ fide* taker for value (like the defendant here), does not confer upon such taker a right to retain them against the registered proprietor, or any person claiming through him. Now, for a long time there has prevailed on the Stock Exchange, not alone of America, but of England, and, I believe, of other European countries, a usage of passing such certificates by delivery from hand to hand in sale or pledge; and it is laid down by the highest authority that where a certificate of such shares as we are dealing with is duly delivered in the form and manner prescribed by the usage, the endorsed transfer having been executed by the registered owner in blank, such delivery will confer on the deliverer for value and without notice, not the property in the shares, but a right to have his name entered by the company on the register of shareholders, and thus constitute himself the legal owner of the shares; and as a necessary consequence such holder of the certificate is entitled to retain it against any person claiming title from the registered owner."

Judgment.
MacMahon,
J.

So also in *Waterhouse v. Bank of Ireland* (1892), 29 L. R. Ir., Chatterton, V.C., at p. 394, refers to these opinions of Lords Watson and Herschell, and recognizes them as authorities by which he is bound.

I do not think we are concerned with *Earl of Sheffield v. The London Joint Stock Bank* (1888), 13 App. Cas. 333, because the facts disclosed in that case shewed that the banks in dealing with one Mozley, a money-lender, either actually knew, or had reason to believe, that the securities deposited with the banks as security for large running accounts might not belong to Mozley but to his customers.

There was great misapprehension as to the effect of the decision in that case, and Lord Chancellor Halsbury, who took part in the judgment of the House, explained its effect in *London Joint Stock Bank v. Simmons*, [1892] A. C., at p. 211, where he says: "The inferences derived

Judgment. from the business carried on by the money-lender in *Lord*
MacMahon, *Sheffield's* case, were peculiar to that case, and have no
J. relation to the course of business which brokers habitually
pursue towards their own clients, and for their own
clients, when dealing with bankers with whom they
deposit securities. The deposit of securities as 'cover'
in a broker's business is as well-known a course of dealing
as anything can possibly be, and the phrase that they are
deposited *en bloc* seems to me to be somewhat fallacious.
That they are, in fact, deposited by the broker at one time,
and to raise one sum, may be true. It does not follow, and I
do not know, that the banker could reasonably be ex-
pected to presume that they belonged to different cus-
tomers, and that the limit of the broker's authority was
applied to each individual security by his own client. It
would, therefore, to my mind, be as totally different from
the facts proved or inferred in *Lord Sheffield's* case as
anything could well be.

"I do not think that in that case any countenance was
given to the notion that because Mozley, the money-
lender, was assumed to be the agent for the owners of the
property, that circumstance alone put the bank upon
inquiry as to his title to the property with which he dealt.
To lay down as a broad proposition that in every case you
must inquire whether a known agent has the authority of
his principal would undoubtedly be a startling proposition,
and certainly nothing said in *Lord Sheffield's* case could
justify so novel an idea."

Rogers and Hubbell were reputable stock-brokers. Hub-
bell possessed the confidence of the plaintiff, otherwise
it is not reasonable to suppose she would have executed
transfers of these stock certificates in blank and entrusted
him with them.

According to the plaintiff's statement she signed the
transfer on the Commercial Cable certificate, and deliv-
ered it to Hubbell with the intention of parting with her
property in it. And Falconbridge, J., has found that she
signed the transfer of the Montreal Street Railway shares,
and, as said by Lord Watson, "When a registered share-

holder does that he can have only one intelligible purpose in view, that of passing on his right to a transferee:" p. 280, 15 App. Cas. And that is the effect of what is said by Lord Herschell in the above short extract from his judgment.

Judgment.
MacMahon,
J.

Some observations of FitzGibbon, L.J., in *Hone v. Boyle* (1891), 27 L. R. Ir., are so apposite as to the dealings between Rogers and Hubbell and the Molsons Bank in this case, and by which the latter acquired the stock certificates, that I extract them. He said (p. 166): "There is no illegality nor startling improbability in a stock-broker's being possessed of securities of his own. But further, not only is there no improbability in a stock-broker's being authorized to pledge securities for his customers, but there is a body of proof that such transactions are of every-day occurrence; and the House of Lords, in *Lord Sheffield's* case has treated it as 'part of the ordinary course of a banker's business' to make advances to money-lenders on pledge of the securities of individuals to whom the pledgers are to lend in turn. A large department of banking business must cease if the mere fact that the holder of securities is a broker puts the banker upon inquiry, or subjects him to the burden of proving the broker's authority to pledge. At best this 'putting on inquiry' is only a half-hearted conclusion. If the question, 'Are these shares yours?' or, 'Have you authority to pledge them?' were held to suffice, the answer 'Yes' would add little or nothing to the representation *ipso facto* made by the request for the advance, and the offer to deposit the securities." See also the judgment of Lord Chancellor Halsbury in *The London Joint Stock Bank v. Simmons*, [1892] A. C., at p. 211.

Hubbell, without any enquiry being made as to the ownership of the Commercial Cable stock, represented to Mr. Brodrick that he had purchased it. In a bank's dealings with a broker who is obtaining an advance on a deposit of securities, where the registered owner of stock signs a transfer and power of attorney in blank and hands it to a reputable stock-broker, what is there in such a transaction to put a banker on enquiry? From whom would he enquire? and what would be the form of the

Judgment. enquiry? The enquiry would be made from the person
MacMahon, pledging the securities, and as to one of the securities the
J. bank had Hubbell's statement that he was the owner. If
enquiry was necessary and had been made as to the other,
we may well infer that the representation as to that would
have been the same.

The only evidence as to custom was that given by Mr. Brodrick, furnished by his experience as a banker. And where we have the universal custom detailed as to the mode of transfer of such securities both in England and the United States, in *Colonial Bank v. Hepworth*, 36 Ch. D. 53, and *The Colonial Bank v. Cady* (1890), 15 App. Cas. 267, which accords with Mr. Brodrick's evidence, we may conclude that the custom in Canada does not differ with that of bankers in Great Britain and the States. In *The Colonial Bank v. Cady*, five officials of London banks were examined by the appellants as to the custom by banks in dealing with transfers of such certificates.

I have not considered the question as to the effect of the bank having taken a separate assignment from Hubbell by hypothecating the certificates when the advances were made, as I consider on the authorities the bank is entitled to retain the shares as against the plaintiff. But one observation may be made as to the hypothecation sheet pledging the Commercial Cable stock. It pledged two shares of the same stock standing in the name of V. C. Nicholson, which had been purchased by Rogers and Hubbell, and which the bank sold on the 3rd of August, three months after it had been pledged.

The appeal will, therefore, be allowed with costs, and judgment directed to be entered for the defendants the Molsons Bank, dismissing the action as against it with costs.

ROSE, J. :—

The opinions of the other members of the Court are so full that I content myself with expressing my concurrence in the result reached by them, that the appeal must be allowed.

G. A. B.

[DIVISIONAL COURT.]

REGINA V. GUITTARD.

Intoxicating Liquors—Liquor License Act—Dominion Licenses—Wholesale License—Sale in License District to Unlicensed Persons—R. S. O. ch. 245, secs. 34, 51.

A brewing company, holding the Dominion license referred to in sec. 51, sub-sec. 1, of the Liquor License Act, R. S. O. ch. 245, and also a Provincial wholesale license, as defined by sub-sec. 4 of sec. 2 of that Act, sold through their manager, liquor in wholesale quantities to an unlicensed person in the district in which they had obtained their Provincial wholesale license :—

Held, that the sale was authorized under sub-sec. 3 of sec. 51 of the Act; and that it was not requisite for the company to take out another wholesale license in the form issuable under section 34.

THIS was a motion to make absolute an order *nisi* Statement, quashing a conviction for selling liquor without a license under the circumstances mentioned in the judgment of FERGUSON, J. It may be stated, however, that it appeared from the evidence that the Ontario Government were in the habit of issuing two kinds of wholesale licenses, the one (marked on its face "brewers and distillers") authorized the licensee as expressed on its face "to sell by sample in original packages under the provisions in that behalf of the Liquor License Act and amendments thereto, any liquor manufactured by the said licensee in his brewery or distillery * * wherein such manufacture is carried on, provided such brewery or distillery forms no part of and does not communicate by any entrance with any shop or premises wherein any article authorized to be manufactured under the license granted to the said licensee by the Government of Canada is sold by retail, or wherein is kept any broken packages of such article. Provided further, that ale or beer or lager beer may be sold by sample or in original packages in any municipality of the Province by the said licensee to persons being holders of a license to sell under the Liquor License Act in any part of the Province, but ale or beer other than lager beer is not to be sold, bartered or trafficked in by the

Statement. licensee in quantities less than ten gallons, wine measure, in each cask at any one time, etc. * * Nothing in this section shall prevent a brewer from selling to other than licensees in wholesale quantities in any district in which he may obtain a wholesale license." The other form (marked on its face simply "wholesale license") of wholesale license authorized the licensee "to sell by wholesale, under the provisions in that behalf of the Liquor License Act and amendments thereto in quantities not less than five gallons in each cask or vessel at any one time spirituous, fermented or other manufactured liquors in his warehouse." * *

The question here was whether the defendant, who was the manager of a brewing company, required both these wholesale licenses to authorize the sale made.

The motion was made before a Divisional Court consisting of BOYD, C., and FERGUSON, J., on January 30th, 1899.

Haverson, for the defendant, contended that the defendant had a right to sell as he had done in the district in which his company had obtained their wholesale license: R. S. O. ch. 245, sec. 51, sub-secs. 2 and 3; *Bowie v. Gilmour* (1897), 24 A. R. 254; that so long as he was selling in his own district he did not want another wholesale license under sec. 2, sub-sec. 4.

J. R. Cartwright, Q.C., for the Crown, contended that there were the two kinds of wholesale license; that a brewer's license only justified sales to licensees, and that if a man wanted to sell to unlicensed persons, and in quantities less than ten gallons, he must take out an ordinary wholesale license; that a brewer's wholesale license, though issued in a district, cannot be said to come under R. S. O. ch. 245, sec. 51, sub-sec. 3, as being a license for a particular district.

Langton, Q.C., for the prosecutor, contended that sec. 34 of R. S. O. ch. 245, and not sec. 2, sub-sec. 4, was the section regulating wholesale licenses; that the sale here

was not at the brewery, which distinguished *Bowie v. Gilmour*; that what the defendant required was the license referred to in sec. 51, sub-sec. 3, read with section 34.

Haverson, in reply, said that the whole question was whether a brewer could sell to an unlicensed person, and that a brewer's license was a license to sell his own liquor, a wholesale license was one to sell anybody's liquor.

February 2nd, 1899. FERGUSON, J.:—

The motion is to quash a conviction of the defendant of the offence of having, on the 23rd day of May, 1898, at the city of Windsor in the county of Essex, unlawfully sold liquor without the license therefor by law required. This is the way in which the offence is stated in the conviction which bears date the 30th day of June, 1898, and was made by the police magistrate of the city of Windsor. The alleged offence is also stated in the same manner in the information that was laid before the magistrate.

The defendant was, at the time of the act complained of, the manager of the Windsor Brewing Company who carried on their business in the city of Windsor, and on the evidence it is plain (as was stated and conceded in the argument) that the sale complained of was really a sale made by this brewing company, and that company had at the time of the sale a license from the Government of Canada such as is mentioned in the 51st sec., sub-sec. 1 of R. S. O. 1897 ch. 245 known as the Liquor License Act. Sections 49 and 50 appear to be the prohibitory sections of the Act, and section 51 provides that these sections 49 and 50, shall not prevent any brewer, distiller or other person duly licensed by the Government of Canada for the manufacture of spirituous, fermented or other liquors, from keeping, having or selling any liquor manufactured by him in any building wherein such manufacture is carried on, with a provision in respect of such building not communicating with or forming part of

Judgment. any shop or premises wherein any article authorized to be
Ferguson, J. manufactured under the license is sold by retail or kept
in broken packages.

Sub-section 2 of this same section 51, provides that every such brewer, distiller or other person, shall also first obtain a license to sell by wholesale under this Act (the Liquor License Act), the liquor so manufactured by him when sold for consumption in this Province, under which license the said liquor may be sold by sample or in original packages in any municipality, with a provision that ale or beer or lager beer may also be sold by sample or in original packages in any municipality of the Province by licensed brewers to persons being holders of a license to sell under the Act in any part of the Province, with a further provision that ale or beer other than lager beer shall not be sold, bartered or trafficked in by such licensed brewers in quantities less than ten gallons in each cask at any one time, or lager beer in quantities less than four gallons in each cask at any one time or except in bottles as limited by clause 4 of section 2 of the Act.

And sub-section 3 of the same section 51 provides that nothing in the section (51) shall prevent a brewer from selling to others than licensees in wholesale quantities in any district in which he obtains a wholesale license.

It does not appear that the sale made in this case was a sale in quantities less than those that may be sold under a wholesale license. The sale was to a person who was not the holder of a license.

For the defendant it was contended that the sale was properly made under the license to sell by wholesale held by the brewing company, the sale having been made by their manager, and really by them, in the course of their business in the district in which they had obtained this license.

It was on the other hand contended that the license to sell by wholesale held by the brewing company did not authorize such a sale as this one, but that to have the sale authorized the brewing company should have obtained

another license, a wholesale license, the contention on the immediate subject being that the wholesale license mentioned in sub-sec. 3 of sec. 51 is something entirely different from the license to sell by wholesale mentioned in sub-section 2 of the same section, that one means a brewer's wholesale license and the other a wholesale license.

I have read and re-read the sections of the Act, including sections 41 and 44, with the view of being able to perceive clearly this difference so contended for, but find myself still unable to do so. According to the words of the statute there is as great reason for calling the license mentioned in sub-section 3 a brewer's wholesale license as there is for calling by this name the license mentioned in sub-section 2 of this section 51, and as it appears to me, the expressions "license by wholesale," "wholesale license," and "license to sell by wholesale," may be treated as interchangeable expressions.

This was in reality a sale made by the brewing company of liquor manufactured by them to a person not being a licensee, and, whether or not the sale can be considered as having been made at their manufactory, it was at all events made in wholesale quantities in the district in which they had obtained their license to sell by wholesale. The company was simply selling through their manager and agent, the defendant Guittard.

I am willing to say that the sections of the Act do not make their meaning very plain to me, but after the best consideration I have been able to give the subject my conclusion is that the sale complained of was an authorized sale and that the conviction of the defendant is wrong and should be quashed.

There are, I think, reasons why there should be no costs.

BOYD, C.:—

Looking at the various provisions of the Liquor License Act, I am led to the conclusion that there is but one wholesale license required under section 51 in order to

Judgment.
Ferguson, J.

Judgment.

Boyd, C.

qualify a brewer (who has also a Dominion license) to sell his own products in wholesale quantities within the district in which he obtains his Provincial license. It is not easy to draw a congruous and consecutive meaning out of the compound of provisions which are now consolidated in that section 51, but bearing in mind that a person, even a brewer, is not to be penalized on doubtful enactments, the better construction is in conformity with the holding of the Judges in *Bowie v. Gilmour* (1897), 24 A. R. 254. While the first sub-section may restrict to sales in the manufactory, the third sub-section permits the area of operations to extend to the district in which the license is obtained, and the second sub-section amplifies the permission to any municipality of Ontario when the dealing is by sample or in original packages.

The license to sell by wholesale under the Liquor License Act to be obtained by brewers is that which is elsewhere designated in the Act "a wholesale license." There is but one and the same fee provided for one and the same wholesale license: see sections 41 and 44. The interpretation clause defining "license by wholesale," or "wholesale license," section 2 (4), applies to the provisions of section 63, where the phrase is (as in section 51) "a license to sell by wholesale": see forms in schedule F., 8 and 11, p. 3025. The brewer who has obtained the license to sell by wholesale mentioned in section 51 (2) has thereby obtained the wholesale license indicated in section 51 (3), and may vend his beer by wholesale in that license district where his brewery is situate: section 2 (6). Nor is he thereby restricted so that he can sell only to licensees, which is the peculiar provision in the latter part of sub-section 2. As I read the Act, the only restriction as to his selling in the home-license district is that he sells in wholesale quantities.

The scheme of the Act appears to be that a person licensed by the Dominion to carry on the business of a brewer may sell liquor made by him in that building, subject to the restrictions in the first sub-section of section 51. Upon obtaining a wholesale license from the Province

he may also sell such liquor in any municipality by sample or in original packages (sub-section 2, first part). He is not prevented, having such a wholesale license, from selling generally in wholesale quantities in the particular district in which his license has been obtained (sub-section 3). He may also sell in any municipality by sample or in original packages to holders of licenses to sell in any part of the Province not less than certain defined quantities of beer, etc., as set forth in the latter part of sub-section 2. The difficulty is that a larger right than this appears to be given by the first part of sub-section 2 of the section 51, and this provision to sell to licensees is expressed as if it were an additional privilege.

Having a wholesale license which permits selling outside of the limits of the brewery, I do not feel the force of the argument that the defendant should get another wholesale license in the form in which it issues to ordinary merchants or dealers in order to his selling under sub-section 3. For this ordinary wholesale license does not permit selling generally in the district, but only in the particular warehouse or place of like kind defined in the license (section 34). If this brewer has not the power now to sell in wholesale quantities in the district where his license has been obtained he would get no further power from a wholesale license under section 34.

The defendant, upon the evidence, did not sell liquor as charged in the information and found in the conviction, without the license therefor by law required. The company for whom the defendant acted was fully licensed in that behalf and cannot be proceeded against as unlicensed under the Act.

There was no proof that the sale was less than in wholesale dealing as defined by the Act. The whole contention centres on the question whether a third license is needed by the company—such, namely, as may be issued to a wholesale dealer other than a manufacturer of beer, and this, as already intimated, is not called for by the statute.

The conviction should be quashed, but without costs.

Judgment.

Boyd, C.

[DIVISIONAL COURT.]

BOYD V. MORTIMER ET AL.

Bills of Exchange and Promissory Notes—Business Carried on by Assignee for Creditors—Note of Assignee—Personal Liability—Signature as Agent—53 Vict. ch. 33, sec. 26 (D.).

An assignee of a partnership, conducting the business under a trust deed for the benefit of the creditors, gave promissory notes to the plaintiffs for goods supplied to him in connection therewith, and signed them in the firm name, followed by his own, with the word "assignee" added. The deed gave him no authority to make notes or accept bills on behalf of the firm, and the plaintiffs had previously refused to draw on the latter, requiring his own acceptance:—

Held, that under these circumstances, and having regard to section 26 of the Bills of Exchange Act, he was personally liable on the notes.

Statement. THIS was a motion by way of appeal from an order of the junior Judge of the County Court of Carleton.

The circumstances of the case are fully set out in the judgment of MACMAHON, J.

The appeal was argued on October 14th, 1898, before ROSE, and MACMAHON, JJ.

George Kerr, for the plaintiff, contended that the defendant Larmonth was personally liable on the notes sued on, and referred to: *Leadbitter v. Farrow* (1816), 5 M. & S. 345; *Armour v. Gates* (1859), 8 C. P. 548; *Laing v. Taylor* (1876), 26 C. P. 416.

G. F. Henderson, for the defendant Larmonth, contended that the Court should look at the actual facts and actual conduct of the parties, to ascertain how the notes were to be construed, as between the original parties to them; and that it was clearly not the intention of the parties here that Larmonth should be personally liable; and referred to *Owen & Co. v. Cronk*, [1895] 1 Q. B. 265; *Cox v. Hickman* (1860), 8 H. L. C. 268; *Mollwo, March & Co. v. Court of Wards* (1872), L. R. 4 P. C. 418; *Gosling v. Gaskell*, [1897] A. C. 575, 592; *Fairchild v. Ferguson* (1892), 21 S. C. R. 484; *Lindus v. Melrose* (1857), 2 H. & N. 293;

Alexander v. Sizer (1869), L. R. 4 Ex. 102; *City Bank v. Cheney* (1858), 15 U. C. R. 400; Bills of Exchange Act, 53 Vict. ch. 33, sec. 26 (D.). Also that if their client was to be held to the strict letter of the notes, he was entitled to a reformation of them: *Druiff v. Lord Parker* (1868), L. R. 5 Eq. 131.

Kerr, in reply, contended that the circumstances pointed not against but to the liability of the defendant Larmonth; and that the notes were useless otherwise, and referred also to *Hamilton v. Jones* (1896), 10 Q. O. R. (S. C.) 496; *New London Credit Syndicate v. Neale*, [1898] 2 Q. B. 487.

January 20th, 1899. MACMAHON, J.:—

The motion is by way of appeal from the order of the junior Judge of the County Court of Carleton, setting aside the judgment directed to be entered by W. A. Ross, Esquire, formerly the senior Judge of said County Court, in favour of the plaintiffs, and directing a new trial, the costs of the new trial and the motion to abide the event.

The evidence at the trial was taken by a stenographer whose notes of the evidence were inadvertently destroyed, and in the notice of motion to the Court below such destruction is made a ground for a new trial for the purpose of retaking the evidence, that being alleged as being necessary to a fair and proper consideration of the matters in question.

The learned junior Judge appears to have acted upon this contention in granting a new trial, for in his written judgment he states, after referring to the loss of the stenographer's notes, "that counsel were desirous of reaching a conclusion as to the litigation, and made certain admissions and certain statements, and that after reading the notes of the evidence taken by ex-Judge Ross and his judgment, I am unable to reconcile the facts therein; I have therefore concluded the best course to pursue is to order a new trial so that the evidence can be had to the satisfaction of all."

Judgment.

MacMahon,
J.

The action was brought to recover the amount of four promissory notes, all bearing date July 15th, 1895, payable respectively in four, five, six and seven months after date. The first three notes are for \$125 each, and the fourth note for \$121. All the notes are in the same form, the first note being as follows:—

“\$125.00

Ottawa, July 15th, 1895.

Four months after date we promise to pay to the order of Messrs. Boyd, Gillies & Co., at the Bank of Ottawa here, one hundred and twenty-five dollars for value received.

Mortimer & Co.

P. Larmonth,

Assignee.”

Judgment was directed to be entered for the plaintiffs against the defendant Larmonth for the amount of the four notes.

Alexander Mortimer and Alexander Edward Mortimer carried on business in partnership in Ottawa, under the name of Mortimer & Co., and on March 21st, 1894, they made an assignment for the benefit of their creditors to the defendant Larmonth. A trust deed was afterwards executed, dated May 1st, 1894, under which the business was to be carried on by Larmonth for the benefit of the creditors of Mortimer & Co. and Alexander Mortimer, —Alexander Edward Mortimer having at that time retired from the firm.

By the terms of the trust Larmonth was to receive \$50 a month for his services as trustee, receiver, etc. He as trustee was “To pay for all the necessary stock and materials, wages and expenses of every kind and nature deemed by the trustee as the receiver, manager, and attorney of the said Alexander Mortimer, hereinafter mentioned, necessary to the carrying on in the future of the business of Alexander Mortimer as bookbinder, lithographer, printer and stationer, and to allow the said Alexander Mortimer the sum of thirty dollars per week as wages for himself.”

While Alexander Mortimer would under the terms of the deed be entitled to any surplus in the estate after paying the existing and all future liabilities incurred by Larmonth necessary to carry on the business, he (Mortimer) was during the continuance of the trust precluded by the terms of the deed from interfering in any way in the management of the business, he being merely a servant under Larmonth, the trustee, receiver, etc.

Judgment.
MacMahon,
J.

The plaintiffs, after Larmonth became trustee and as such was carrying on the business, supplied goods amounting to about \$2,000, some of the invoices for which were headed "Estate of Mortimer & Co.," while others have "per P. Larmonth," added thereto.

Prior to July, 1895, the amount due the plaintiffs had been reduced to \$871. Larmonth at various times wanted the plaintiffs to draw on Mortimer & Co., which the plaintiffs refused to do, insisting that he (Larmonth) was the only person by whom a draft could be accepted. According to the evidence, Larmonth asked the plaintiffs through their agent, Mr. Reford, for time which was agreed to, and for the \$871 they accepted six promissory notes from Larmonth for \$125 each and one for \$121. The first three Larmonth paid; the others are the notes sued on here.

A copy of the evidence taken by Judge Ross covers thirteen pages of typewriting, and his judgment—in which the salient points of the evidence are referred to—covers eight typewritten pages. It was admitted that there were some inaccuracies in Judge Ross's notes, but from the affidavit of Mr. Henderson, counsel for Larmonth, filed on this motion, all such inaccuracies were corrected by the admissions made, for he says: "Being desirous to avoid the expense of a new trial, I suggested my willingness to argue the matter upon the actual facts if these could be agreed upon and if the Court would be willing to permit this course to be adopted. The presiding Judge stated that he considered this course open to objection, but suggested that the facts should be stated and the argument proceeded, in hope that some way out of the difficulty

Judgment.
MacMahon,
J.

might appear. Since the delivery of his judgment, following the said argument, I have been informed by His Honour Judge Mosgrove, that he did not consider it advisable to base a judgment which would be subject to appeal on stated facts which though admitted had not been made matter of record, and that he thought the only way to do complete justice to all parties was to order a new trial of the action in order that the evidence might be properly taken and of record."

Mr. Chrysler, who was counsel for the plaintiff during the argument in term in the County Court, states in his affidavit that he understood Mr. Henderson waived his objection arising out of the loss of the shorthandwriter's notes of evidence, and consented that the Judge should dispose of the motion on the material before him. I assume Mr. Chrysler means on the facts stated and agreed upon, as mentioned by Mr. Henderson, and by which any inaccuracies in Judge Ross's notes were thus corrected.

The facts, according to Mr. Henderson, were stated and the argument proceeded. The inaccuracies in the notes being corrected, no further correction could be required to enable the learned Judge to dispose of the motion. Indeed most of the evidence required for the disposal of the motion is contained in the documents and correspondence produced at the trial.

I think the learned Judge was clearly wrong in ordering a new trial when the admitted facts were before him upon which a judgment could be reached and the motion disposed of.

Now, coming to the merits of the case. The Bills of Exchange Act provides (53 Vict. ch. 33, sec. 26, sub-sec. 1) "Where a person signs a bill as drawer, indorser or acceptor, and adds words to his signature indicating that he signs for or on behalf of a principal, or in a representative character, he is not personally liable thereon; but the mere addition to his signature of words describing him as an agent or as filling a representative character, does not exempt him from personal liability." (Sub-sec. 2.) "In determining whether

a signature on a bill is that of the principal or that of the agent by whose hand it is written, the construction most favourable to the validity of the instrument shall be adopted.”

Judgment.
MacMahon,
J.

This is copied from the 26th section of the Imperial Bills of Exchange Act, 45-46 Vict. ch. 61, and as pointed out by Mr. Maclaren in his work on Bills and Notes, 2nd ed., p. 21, according to the decision of the Master of the Rolls in *Vagliano Brothers v. Bank of England* (1889), 23 Q. B. D. 248, and Stirling, J., in *In re Bethell, Bethell v. Bethell* (1887), 34 Ch. D., at p. 567, and Lord Blackburn, in *M'Lean v. Clydesdale Banking Co.* (1883), 9 App. Cas., at p. 103, the Act may be accepted as declaratory of the prior law. The prior law was settled in *Leadbitter v. Farrow* (1816), 5 M. & S. 345, which is still regarded as the leading authority on the point, and during the eighty intervening years since that decision was delivered the current of authority has not changed. In that case an agent to a country bank to whom plaintiff sent a sum of money in order to procure a bill upon London, drew in his own name for the amount upon the firm in London, the two firms being the same, and it was held that the agent was liable as drawer, although the plaintiff knew he was agent and supposed that the bill was drawn by him as such and on account of the country bank to which the agent paid over the money. Lord Ellenborough said, at p. 349, “Is it not an universal rule that a man who puts his name to a bill of exchange thereby makes himself personally liable, unless he states upon the face of the bill that he subscribes it for another, or by procuration of another, which are words of exclusion. Unless he says plainly ‘I am the mere scribe’ he becomes liable.”

In *Childs v. Monins* (1821), 2 Br. & B. 460, where the makers, as executors of the late T., made a promissory note, they were held personally liable when they did not expressly limit their liability to pay out of the estate.

In *Kerr v. Parsons* (1862), 11 C. P. 513, the defendants, as executors, purchased goods from the plaintiffs and gave

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MacMahon,
J.

notes, the body of which stated: "We, as executors of the late Benjamin Parsons promise to pay," etc., and signed by the executrix and two executors with this description "executrix and executors of B. Parsons, deceased," it was held that they were personally liable.

In *Laing v. Taylor* (1876), 26 C. P. 416, on a bill addressed to M. H. Taylor, Tr. C. S. Ry. Co., and accepted thus, "M. H. Taylor, Tr.," he was held personally liable.

In *Hagarty v. Squier* (1877), 42 U. C. R. 165, on a bill addressed to an insurance company by its inspector, signed "A Squier, inspector," he was held personally liable. So in *Madden v. Cox* (1879), 44 U. C. R. 542, which was affirmed in appeal (1880), 5 A. R. 473, on a bill addressed to the president of the Midland Railway, and accepted thus, "For the Midland Railway of Canada accepted, H. Reid, secretary, George A. Cox, president," held, that the president was personally liable.

In *Liverpool Borough Bank v. Walker* (1859), 4 DeG. & J. 24, where executors carried on their testator's trade in that character and in the ordinary course of business accepted a bill of exchange describing themselves in it simply as executors of the testator, it was held that neither the above circumstances nor the form of the acceptance relieved the executors from the ordinary liability on the bill. See also *Armour v. Gates* (1859), 8 C. P. 548.

Defendant's counsel relied strongly on *Alexander v. Sizer* (1869), L. R. 4 Ex. 102, and *Fairchild v. Ferguson* (1892), 21 S. C. R. 484. In *Alexander v. Sizer*, the signature to the promissory note sued upon was "For Mistle, Thorpe and Walton Railway Company, 'John Sizer,' secretary." The action was by the payees against Sizer, and it was held that he was not personally liable. The case was fully argued, counsel for the plaintiff contending that the mere fact of the addition of his description could not limit his responsibility. One would have thought that where the signature to the promissory note was "For Mistle, Thorpe and Walton Railway Company," the signature of the company was being attached as principals, *per proc.* "John

Sizer" its secretary ; and that is the way Pigott, B. (p. 106), regards it. He says, " Moreover, the defendant signs 'as secretary' for the company, and the fair construction of the note I think is that he signed as agent only. The money was no doubt for the purposes of the company, and although strictly speaking that does not affect the question, still, as Pollock, C. B., observes, in *Lindus v. Melrose* (1857), 2 H. & N., at p. 297, the surrounding circumstances may be looked at in order to enable the Court to come to a right conclusion, and the circumstances that the money was to go, and did go, to the company, and not to the defendant, fortifies me in the opinion I have already expressed."

Judgment.
MacMahon,
J.

In *Fairchild v. Ferguson*, lumber was sold by Doran & Barr to the Ottertail Lumber Company, for which a promissory note was given, signed "W. D. Rorison, manager, Ottertail Lumber Co.," which was endorsed by the payees to the plaintiffs, who sued the individual members of the company, the defence being that Rorison alone was liable on the note. The Supreme Court, following *Lindus v. Melrose*, had recourse to the surrounding circumstances, and as the lumber was supplied to the Ottertail Lumber Company, and Rorison having authority from the company to sign promissory notes and accept bills of exchange drawn upon the company, the Court therefore held that as the note was made for full value given to their payees who had received the consideration for which the note was given, the company were to be the parties to be bound by it.

While having regard to the provision of section 20 of the Bills of Exchange Act, I have not overlooked the distinction between bills of exchange and promissory notes pointed out by Kelly, C.B., in *Alexander v. Sizer* (1869), L. R. 4 Ex., at p. 105, in considering the question raised here. He said: "The acceptor, though he may purport to accept in some manner limiting his personal liability, becomes liable if he does accept. He cannot vary or limit his liability on the contract ; and by his acceptance of the

Judgment. bill, which is addressed to him, it becomes his contract,
MacMahon, and words of mere description or qualification are not
J. enough, according to the usage of merchants, to exonerate him. If express words of exclusion were to be used, the result might be different, but then the acceptance would in fact be no acceptance at all. Bills of exchange are all drawn on the intended acceptor in a personal character, and if he accept them he must be held to have done so in that character and will be held liable, no matter what words of mere description may be added to his name." To the like effect is *Okell v. Charles* (1876), 34 L. T. N. S. 824, where it is said "a promissory note is a totally different thing from an acceptance of a bill of exchange, which incorporates in the acceptance the person on whom it is drawn."

What are the surrounding circumstances in this case which ought to be considered in order to enable us to reach a right conclusion? Upon the execution of the trust deed of May 1st, 1895, Larmonth, as trustee, was, under the sixth clause thereof already referred to, to pay for all necessary stock, materials, etc., necessary to carry on the business. He, as trustee, paid for two-thirds of the goods ordered from the plaintiffs, included in such amount being three of the promissory notes given by him on account of the goods so purchased. No payment was to be made on behalf of the business except through him; and no goods or property of any kind were to be disposed of without his consent. But under the trust deed he had no authority to make promissory notes or accept bills of exchange on behalf of Mortimer & Co. The moneys received during the two years of his trusteeship he deposited in the bank to his general account, mixing the same with his own moneys.

In *Owen & Co. v. Cronk*, [1895] 1 Q. B., at p. 275, Rigby, L.J., said: "Executors or trustees who carry on a business do so on the well-understood terms that they are to be personally responsible to creditors, but are to be entitled to an indemnity out of the estate. So also when a receiver is appointed by the Court to carry on a business he accepts

the appointment on the terms that he will be personally responsible to the creditors of the business, whilst he will be indemnified out of the estate.”

Judgment.
MacMahon,
J.

I would also refer on this point to the language of the same learned Judge in *Gaskell v. Gosling*, [1896] 1 Q. B., at p. 700. In that case the judgment of the majority of the Judges in the Court of Appeal was reversed, and that of Lord Justice Rigby followed and affirmed by the House of Lords, [1897] A. C. 575.

The defendant Larmonth virtually sets up that the plaintiffs and the other creditors of Mortimer & Co., by joining in the trust deed, became partners, and that he (Larmonth) was their agent and manager. That contention is met and answered by *Cox v. Hickman* (1860), 8 H. L. Cas. 268; *Bullen v. Sharp* (1865), L. R. 1 C. P. 86; and judgment of Rigby, L.J., in *Gaskell v. Gosling* [1896], 1 Q. B., at p. 689; *S. C.* [1897], A. C. 575.

The defendant Larmonth was carrying on the business as trustee, and while so carrying it on became personally liable to the creditors, and, as properly found by Judge Ross, became liable to the plaintiffs on the notes sued upon, for which he may be entitled to be indemnified out of the estate.

The appeal will be allowed, and the order of the Court below granting a new trial must be set aside and the judgment of Judge Ross restored, with costs of this motion and of the motion in the Court below.

ROSE, J.:—

I agree. In my opinion, if the notes of evidence are incomplete and inaccurate that is the defendant's misfortune. We must assume, until the contrary is shewn, that the judgment of the trial Judge was right. The onus of shewing that it was wrong was, of course, upon the party attacking it; and if he has not the material to do so, why should the party in whose favour the judgment was suffer, there being no fault on his part leading to the misfortune?

Judgment. Moreover, it seems to me on the law, as stated by my learned brother, that the defendant has not suffered from any inaccuracy or incompleteness in the record.

Rose, J.

A. H. F. L.

RE WHITTY.

Will—Gift—Mistake in Name of Donee—Validity—Declaration—Originating Notice—Rule 938.

A testator bequeathed a sum of money to his "sister Anastasia Cummings." He had only two sisters, Catharine Kelly, to whom he bequeathed a like sum, by her proper name, and Maria Cummins:—
Held, that the gift took effect in favour of Maria Cummins.
Held, also, that a declaration to that effect could properly be made upon an originating notice under Rule 938.
In re Sherlock (1898), 18 P. R. 6, followed.

Statement. A SUMMARY application by the executors of the will of Michael Whitty, upon the return of an originating notice, under Rule 938, for an order declaring that Maria Cummins was entitled to the one-third of the testator's estate bequeathed by his will to his "sister Anastasia Cummings." The facts are stated in the judgment.

The appeal was heard by MEREDITH, C.J., in Chambers, on the 3rd February, 1899.

Heggie, for the executors and adult next of kin of the testator.

A. McKechnie, for Maria Cummins.

F. W. Harcourt, for the official guardian, representing infants.

February 21, 1899. MEREDITH, C.J.:—

The testator, Michael Whitty, died on the 24th September, 1898, having previously made his will, dated the 6th of that month, by which, subject to the payment of his just debts and funeral and testamentary expenses, he

devised and bequeathed all his property, real and personal, to his executors in trust to convert it into money and divide the proceeds into three equal parts, and pay one part to his sister Anastasia Cummings, one part to his sister Catharine Kelly, and one part to the widow and children of his brother William, "to be divided in equal portions among such widow and children."

Judgment.
Meredith,
C.J.

Provision was also made by the will that if the testator's sisters, or either of them, should be dead at the date of the decease of the testator, the share of the deceased sister should be divided among her children.

The testator, as the evidence shews, never had a sister called Anastasia; he had two sisters, Maria Cummins and Catharine Kelly. It is manifest that it was his sister Maria Cummins for whom he intended to provide by the gift in question.

There is nothing, therefore, to prevent the gift taking effect in favour of Maria Cummins.

Sufficient appears in the description of the legatee to bring the case within the rule *nihil facit error nominis cum de corpore constat*, referred to in Jarman on Wills, 5th ed., p. 350. The object of the gift was a sister of the testator, and a sister who was or had been the wife of some one named Cummins. Maria Cummins answers this description, and there was no one else who could answer it; and the cases cited by Mr. Jarman shew that in these circumstances the gift is a good gift to Maria Cummins.

I am inclined to think that the claim of Maria Cummins might have been supported on the terms of the will without the aid of extrinsic evidence, but the extrinsic evidence which has been adduced makes quite clear who was intended to be the object of the testator's bounty. See the cases referred to in Jarman on p. 406, particularly *Still v. Hoste* (1821), 6 Madd. 192, and the observations of Mr. Jarman as to it.

A question was raised as to whether the declaration asked for could be made under Rule 938.

I am of opinion that it can.

Judgment.
Meredith,
C.J.

Under the corresponding English Rule, Order 55, Rule 3, the test of jurisdiction is whether the question raised is one which before the existence of the Rule could have been determined under a judgment for the administration of an estate or execution of a trust.

Our Rule is wider than the English Rule, and, in addition to the cases included in the latter, gives jurisdiction for (h) the determination of any question arising in the administration of the estate or trust.

The Rule was intended to save the expense of administration of an estate or trust, and ought, I think, to be liberally construed so as to include every case that can reasonably be brought under the operation of its provisions.

The present is, I think, such a case, and it is, I think, clearly within the Rule: see *Re Sherlock* (1898), 18 P. R. 6.

An order will therefore be made declaring that Maria Cummins is entitled to the one-third share of the testator's estate devised and bequeathed to his executors in trust for his "sister Anastasia Cummings," and for payment of the costs of all parties out of that share.

E. B. B.

[DIVISIONAL COURT.]

REGINA V. MOUNT.

*Intoxicating Liquors—Liquor License Act, R. S. O. ch. 245, sec. 124—
Conviction Under—Sale to Inebriate—Order Forbidding—Requisites of.*

The defendant, a licensed tavern keeper in the city of C., in the county of K., was convicted under sec. 124 of the Liquor License Act, R. S. O. ch. 245, of selling liquor at a specified time and place to a certain person, "knowing that the sale of liquor to the said J. H., a drunkard, was prohibited by an order in open Court," made by the convicting magistrate.

Upon this conviction being removed by *certiorari*, the "order" returned was a memorandum signed by the magistrate, as follows: "I make an order forbidding any licensed person giving liquor to J. H., in the county of K., for one year."

It did not appear where and in what circumstances this was made: whether in open Court; whether after summons to J. H.; whether excessive use of liquor by him was proved or admitted—or not:—

Held, that the conviction was bad, and there was nothing in the evidence by which it could be amended.

Seemle, ROBERTSON, J., dissenting, that if there were a proper order brought to the knowledge of the defendant, there would be a violation of the law in making a sale to the inebriate, though the liquor was given to and actually drunk by other persons on the licensed premises.

THE defendant was convicted by the police magistrate Statement. for the city of Chatham "for that he, the said Charles Mount, on the 12th day of October, 1898, in the city of Chatham * * on his premises, being a place where liquor may be sold, unlawfully did sell liquor to John Henry, knowing that the sale of liquor to the said John Henry, a drunkard, was prohibited by an order in open Court made by Michael Houston, police magistrate, * * under the Liquor License Act," and was sentenced to pay a fine of \$20.

By sec. 124 of the Liquor License Act, R. S. O. ch. 245, it is provided:—

(1) Where it is made to appear in open Court sitting in the county in which he resides, that any person, summoned before such Court, by excessive drinking of liquor, mispends, wastes or lessens his estate, or greatly injures his health, or endangers or interrupts the peace and happiness of his family, the police magistrate or justices holding such

Statement. Court, shall, by writing under the hand of such police magistrate, or under the hands of two of such justices, forbid any licensed person to sell to him any liquor for the space of one year, and such police magistrate, justices, or any other two justices, of the county in which the said person resides, may, at the same or any other time, in like manner, forbid the selling of any such liquor to the said person by any licensed person of any other city, town or district, to which he resorts or may be likely to resort for the same.

(2) Any person so prohibited or notified, his servants or agents, who violates the preceding sub-section, shall for a first offence be liable to a penalty not exceeding \$20, and for a second, and any subsequent offence, shall be liable to a penalty of not less than \$20 and not exceeding \$50.

(3) Wherever the sale of liquor to any such drunkard has been so prohibited, if any other person, with a knowledge of such prohibition, gives, sells, purchases, or procures for or on behalf of such prohibited person, or for his or her use, any liquor, such other person shall, upon conviction, incur for every such offence, a penalty of not less than \$25 and not exceeding \$50.

The conviction having been removed into the High Court by *certiorari*, the document returned as the "order" upon which the conviction proceeded was a memorandum as follows:—

"I make an order forbidding any licensed person giving liquor to John Henry, in the county of Kent, for one year. M. Houston, Police Magistrate. Chatham, September 8, 1898."

A rule *nisi* to quash the conviction having been granted, a motion to make it absolute was heard by BOYD, C., FERGUSON and ROBERTSON, JJ., on the 23rd February, 1899.

Haverson, for the defendant. No offence is disclosed by the information, the conviction, or the evidence. It does not appear that the order was made by a Court in the

same county; nor that Henry was summoned before that Court; nor that he was guilty of excessive drinking. The conviction is bad on its face, and the evidence does not help it out. Argument.

M. Wilson, Q.C., for the complainant, referred to the Criminal Code, secs. 889, 890, 883; *Northcote v. Bruncker* (1887), 14 A. R. 364; *Regina v. Coulson* (1893), 24 O. R. 246; *Regina v. Coulson* (1896), 27 O. R. 59; *Regina v. Wallace* (1883), 4 O. R. 127; *Regina v. Walsh* (1897), 29 O. R. 36; *Regina v. Hodgins* (1886), 12 O. R. 367; *Ward v. The State* (1885), 45 Ark. 351; *The State v. Munson* (1874), 25 Ohio, 381; *Regina v. Dias* (1898), 1 Can. Crim. Cas. 534; *Regina v. Bowman* (1898), 2 Can. Crim. Cas. 89.

Haverson, in reply, cited *Regina v. Elliott* (1886), 12 O. R. 524; *Regina v. Brady* (1886), *ib.* 358.

March 1, 1899. BOYD, C.:—

This is a conviction purporting to be under R. S. O. ch. 245, sec. 124. There is no evidence in the papers transmitted on the *certiorari* that any restrictive order or direction was made under and in pursuance of the method prescribed in the first sub-section. The statute requires (1) that it should be made to appear in open Court in the county wherein the person resides, (2) that he be summoned before the Court, (3) that it appears by excessive drinking of liquor he misspends, wastes, or lessens his estate, etc.: then the police magistrate may, by writing under his hand, forbid any licensed person to sell liquor to such person for the space of one year.

The writing produced in this case runs thus:—

“I make an order forbidding any licensed person giving liquor to John Henry, in the county of Kent, for one year.

“(Signed) M. HOUSTON, P.M.

“Chatham, Sept. 8th, 1898.”

It does not appear where and in what circumstances this was made. Whether in open Court, whether after

Judgment.

Boyd, C.

summons to the man, whether excessive use of liquor by him was proved or admitted—or not. The prohibition is in excess of the statute, which forbids *sale*—this order forbids giving. This special power—most beneficial when properly applied—must, nevertheless, be carefully exercised, after the fulfilment of all preceding conditions, and in the very terms of the statute—as it works interference with the man himself, and prohibition as to the licensees notified. The foundation of the whole proceeding to convict under the other sub-sections of the statute is gone if there is no valid preliminary order or direction in writing. There is then nothing to amend by, and the conviction as it stands is not in legal form, and calls for amendment, if it be possible.

My opinion is, that had there been a proper order forbidding the sale, and that was served upon, or the knowledge of it brought home to, the defendant—the evidence here shews a violation of the law in making sale to the inebriate, though the liquor was given to and actually drunk by other persons on the licensed premises. I would have upheld the conviction as against this objection, but the other seems to be beyond remedy.

Quash without costs.

FERGUSON, J. :—

I concur in this judgment.

ROBERTSON, J. :—

I think the conviction must be quashed.

There is no proof of an order having been made under sec. 124 of the Liquor License Act. There is a memorandum or note written by the magistrate in these words :

“I make an order forbidding any licensed person giving liquor to John Henry, in the county of Kent, for one year.

“(Signed) M. HOUSTON, P.M.

“Chatham, Sept. 8, 1898.”

There is no other evidence that any such order was made. This is a mere memorandum or note, such as would be made in the note book of the magistrate. The section requires the order to be in writing, under the hand of the magistrate, and in a matter of so serious import as to interfere with the rights and liberties of the subject, and which makes other persons liable to a fine and imprisonment for infringement or disobedience of such order, all due form must be observed ; and although it is not required to be under seal, I think it should state the facts and circumstances, the reasons for summoning the person, and the evidence on which the order is made. There is, therefore, no foundation on which the conviction rests, and consequently the Liquor License Act has not been infringed upon, so far as appears.

Nor is there any evidence that the order, such as it is, came to the knowledge of the defendant before the act complained of was committed.

Then the conviction is for that he, the said Charles Mount, on the 12th October, 1898, in the city of Chatham, etc., in his premises, being a place where liquor may be sold, unlawfully did sell liquor to John Henry, knowing that the sale of liquor to the said John Henry, a drunkard, was prohibited by an order in open Court made by Michael Houston, P.M. for, etc., under the Liquor License Act.

There is no evidence that the defendant knew that the sale of liquor to Henry had been prohibited, and although the conviction is for unlawfully selling liquor to Henry, the magistrate finds that such liquor was not consumed by Henry, but by other persons, and he specially finds and returns in compliance with the writ of *certiorari* as follows :

“In this matter I find that as a fact John Henry ordered liquors at the hotel of the defendant, Charles Mount ; that the liquors were delivered upon his order and drunk in his presence by a number of persons ; but that the liquors were not actually delivered to said John Henry, and no part of such liquors were drunk by him.

Judgment.

Robertson, J. “I find that the said John Henry paid for said liquors delivered to those parties in his presence and drunk by them, and upon the above finding I find that the defendant sold the liquor to Henry which was ordered by him, although delivered to the other parties and consumed entirely by them, and that it comes within the Act, and I find the defendant guilty accordingly.”

The 124th section of the Act, in my judgment, means the selling of liquor to the person named in the order for his own personal consumption, not for the consumption of other persons, against whom no such order is directed. A person against whom any such order is made, may have completely reformed and may have ceased to be a person of excessive drinking habits, within the meaning of the section, long previous to the expiration of the time prohibited by the order, and may not in any sense be a drunkard, and to say that the Act means, notwithstanding all that, that such person shall not in any sense offer to a friend a glass of liquor, although the order is still in force, in my opinion, is not what the Legislature meant when it gave its sanction to the Act. A man may misspend or lessen his estate, etc., as he pleases, so long as in so doing he is not doing it by excessive drinking, contrary to the Liquor License Act, or by committing a crime. In my judgment, the Act contemplates the personal consumption of the liquor by the person who is named in the order, and so long as that is not the fact, no licensed person, or other person, can be made responsible by selling liquor to such person not to be consumed by himself.

Before an order under the 124th section of the Act is made, it must be established, to the satisfaction of the magistrate before whom the person is summoned, that such person, by excessive drinking of liquor, misspends, etc., not that he is misspending, etc., in any other way; and such order when made must be proven to have come to the knowledge of the licensed person who is charged with selling, etc.

The words of the Act are, that the order is to “forbid

any licensed person to sell to him (the drunkard) any liquor for the space of one year," etc. It would not meet the case of another person treating, as it is called, the person named in the order; so that the selling of liquor to another person, to be consumed by the person named in the order, is not covered by the Act. Judgment.
Robertson, J.

These are my personal views of the purport and meaning of the section in question.

E. B. B.

[DIVISIONAL COURT.]

RE MASSACHUSETTS BENEFIT LIFE ASSOCIATION.

JUNKIN'S CASE.

BABCOCK'S CASE.

PALFRAMAN'S CASE (AND OTHERS').

Life Insurance—Benefit Society—Total Disability—Non-payment of Assessments after Claim Made—Forfeiture—Vested Right—55 Vict. ch. 39, sec. 42 (O.)—Application of, to Contract—Novation—Determination of Disability—Directors of Association—Effect of Winding-up Order.

Certificates of life insurance issued by a benefit society provided that in case of total disability, one-half the amount of the insurance should be payable to the insured. This was subject to the following conditions, among others :—

"3. If the assured shall, at any time within thirty days after receiving due notice, fail to pay * * the assessments * * then * * the association shall not be liable for payment of any sum whatever, and this certificate shall cease and determine."

"7. In every case when this certificate shall cease and determine * * all payments thereon shall be forfeited to the association * * ."

A call was made by the association on the 1st March, 1897, payable on the 1st April, and notice given to T., who was then a member in good standing; on the 10th March he made a claim for total disability; and made default in paying the call on the 1st April. Further notice was given him by letter of the 9th April, by which he was to pay in fifteen days, but he failed to do so; and afterwards, upon a reference for the winding-up of the company, sought to prove a claim :—

Held, that he was not entitled.

B. made a claim for total disability on the 18th February, 1897, and put in the usual proofs, but no response was made by the association. He paid the call due on the 1st April, and no further call was made till the 1st June :—

Held, that his right of action vested before any subsequent call was made, and it was not essential for him to continue his membership after de-

fault arose on the part of the association to pay his claim; and therefore there was no bar to his establishing his claim upon the reference. Default of the association arose after sixty days from the furnishing by B. of proofs of total disability; for sec. 42 of 55 Vict. ch. 39 (O.) applied to the contract, there having been a novation, after the passing of that Act, of the original insurance contract, which was made in 1885.

Another certificate issued by the association provided that in the event of the insured becoming totally and permanently disabled, and the determining of such disability by the medical director and board of directors of the association, there should be paid to the member, at the option of the board, if he should so request in writing at any time while the policy was in full force, upon the surrender to the association and the cancellation of the certificate, in full discharge and settlement of all claims under the contract, one-half of the amount of the insurance.

Under this a claim for total disability was made after an order for the winding-up of the society:—

Held, that the effect of the order was to destroy the functions of the directors and officers and practically to determine the contract; and, as the conditions upon which the total disability benefit was to become payable were impossible of fulfilment, the claimant was not entitled to prove in the winding-up proceedings; but the denial of his claim was to be without prejudice to his proving for damages or otherwise on his policy.

Statement.

ON the 19th August, 1897, an order was made for the winding-up of the above named association under the provisions of the Winding-up Act, R. S. C. ch. 129, and the Insurance Act, R. S. C. ch. 124, and directing a reference to the Master in Ordinary for that purpose.

The Canadian Mutual Aid Association was incorporated under R. S. O. 1877 ch. 167, in 1880. It afterwards changed its name to the Canadian Mutual Life Association, and on the 20th July, 1892, transferred its assets and business to the Massachusetts Benefit Association, which was an incorporated company transacting the business of life insurance upon the assessment plan in the State of Massachusetts, and which afterwards changed its name to the Massachusetts Benefit Life Association and continued to transact such business, both in the State of Massachusetts and in the Dominion of Canada, until the making of the winding-up order.

JUNKIN'S CASE.

John Junkin applied for membership in the Canadian Mutual Aid Association on the 5th January, 1882, and received a certificate of membership dated the 9th Feb-

ruary, 1882, which witnessed that, in consideration of the representations made to it in the application, and of the sum of \$11 duly paid, and of the further payment of an assessment of \$1 to be made at the death of a member, in accordance with the rules and regulations of the association, it assured the life of John Junkin in the amount of such sum as would equal eighty-five per cent. of the amount collected on the assessment made for the payment thereof, but not to exceed \$1,500; and the association promised and agreed to pay the amount of the claim, in conformity with such rules and regulations, to be equally divided between his heirs, within ninety days after due notice and proof of death, and *in case of total disability one-half the amount of certificate shall be payable to the insured.* Statement.

This certificate was subject to a number of conditions, of which the following are material:—

3. If the assured shall, at any time within thirty days after receiving due notice, fail to pay, or cause to be paid, the assessments at the office of the association, and in accordance with the rules and regulations of said association, then and in every such case the association shall not be liable for payment of any sum whatsoever, and this certificate shall cease and determine.

5. A printed or written notice directed to the address as last given by a member, and deposited in the post office or delivered by an agent of the association, shall be deemed a legal notice.

7. In every case when this certificate shall cease and determine, or become null and void, then all payments thereon shall be forfeited to the association, and in no case shall the membership fee paid upon the issue hereof become or be repayable to the said assured.

Upon the transfer of the assets and business of the Canadian Mutual Life Association to the Massachusetts Association, the latter delivered to Junkin a contract, to be attached to his certificate, recognizing it as binding upon them, and he accepted such contract and paid to them all premiums, dues, and assessments called for by the

Statement. certificate and contract down to and including call 100, dated the 1st January, 1897.

On the 1st March, 1897, the association made call 101 upon the members, and Junkin received a notice calling upon him to pay \$25.96 on or before the 1st April then next, "in order to maintain your certificate in force, which will otherwise lapse and be void."

On the 10th March, 1897, Junkin signed and swore to a claim for total disability benefit, as to which he had previously been in correspondence with the association, and sent it to the association.

On the 9th April, 1897, the association notified Junkin by registered letter that the assessment due on the 1st April had not been paid by him, and that if, within fifteen days after receipt of such notification, he should make payment of such assessment, with the additional amount of fifty cents, his certificate should be continued in force.

In answer to this Junkin wrote that he did not think he should have to pay it, as he had sent in his disability claim.

On the 27th April, 1897, the association wrote that he was in error as to this, and that every assessment which had been or might be levied upon his policy, until the disability claim should be determined, would have to be paid in order to keep the policy in force.

On the 5th May, 1897, Junkin sent to the association a money order for the amount of call 101, which the association returned as being too late.

The association made subsequent calls, of which Junkin was not notified, and none of which he paid.

The association did not pay his disability claim, and he brought no action for payment therefor, but made his claim in the winding-up proceedings.

A special case was agreed to between the liquidator and Junkin, under the direction of the Master in Ordinary, which stated the above facts, and that the question for the determination of the Court was whether, assuming that the claimant was, in fact, totally disabled within the

meaning of his certificate at the time he made his claim, Statement.
he was now entitled to be placed by the liquidator on the list of creditors and to be ranked as a creditor of the association in the liquidator's statement referred to in sec. 111 of the Winding-up Act.

The Master found that the question should be answered in the negative, and so certified.

Junkin appealed from the certificate, and his appeal was heard by a Divisional Court composed of BOYD, C., FERGUSON and ROBERTSON, JJ., on the 20th and 21st February, 1899.

J. H. Moss, for the appellant, contended that he had an accrued right of action before call 101 was made or enforceable, and also that the association had not, in fact, exercised their right to forfeit until after they had received the money order in May.

Watson, Q.C., for the liquidator, contra.

March 13, 1899. BOYD, C.:—

Call No. 101 was made on the 1st March, and notice given to the claimant, then a member in good standing of the association; on the 10th March he made claim for total disability; and made default in paying this call on the 1st April. Further notice was given him by card of the 9th April, by which he was to pay in fifteen days after the receipt of the notice. This would give further time—to about the 2nd May—but he again made default; and I think the proper result of this repeated default was to end his membership and to relieve the association from liability for any sum whatever, according to the very terms of the conditions 3 and 7 printed on face of his certificate. There was no correspondence to avert this result. I think the Master's ruling should be affirmed.

FERGUSON and ROBERTSON, JJ., concurred.

Statement.

BABCOCK'S CASE.

The case of Seth Babcock was similar to that of John Junkin. He became a member of the Canadian Mutual Aid Association in 1885, and continued his membership in the Massachusetts Association after the transfer in 1892.

His application for allowance of his claim for total disability was dated the 18th February, 1897. He duly paid call No. 101, but did not pay call 102, which was made on the 1st May, 1897, payable on or before the 1st June, 1897. By a report of the medical director of the company, dated 10th March, 1897, Babcock was "not found to be totally and permanently disabled;" but this was not communicated to Babcock.

By sec. 50 of the Ontario Insurance Act, R. S. O. ch. 203, "Every lawful claim against an insurance corporation, under any contract within the meaning of section 2 shall become legally payable on the expiration of sixty days after reasonably sufficient proof has been furnished to the corporation of the happening of the event on which such claim was by said contract to accrue * *."

The original of this enactment, as applicable to friendly societies, is to be found in sec. 42 of 55 Vict. ch. 39 (O.), which received the Royal assent on the 14th April, 1892, before the transfer from the Canadian Mutual Life Association to the Massachusetts Association.

The Master found against Babcock's claim upon a special case submitting the same question as that in Junkin's case, and Babcock appealed.

The appeal was heard on the same days and by the same Court as in that case.

Tremeear, for the appellant.

Watson, Q.C., for the liquidator.

March 13, 1899. BOYD, C.:—

Babcock paid call 101, and was in good standing, and no further call made till the 1st June, 1897.

He made claim for total disability on the 18th February,

1897, and put in the usual proofs, but no response was made by the company to this claim. (A ruling of the 10th March, which is now with the papers, was not disclosed to him.)

Judgment.

Boyd, C.

I think that, owing to the novation of the insurance contract by the introduction of the Massachusetts Association in 1892, the provision of R. S. O. ch. 203, sec. 80 (see 55 Vict. ch. 39, sec. 42 (O.), applies, giving sixty days as the limit within which the claim is to be investigated prior to the right of the claimant to sue therefor.

Assuming total disability as put in the special case, I think there was on his part a right of action vested before any subsequent call was made, and that it was not essential for the claimant to continue his membership after default arose on the part of the company to pay his claim. The Master's certificate should be vacated and opportunity given for Babcock to establish his claim.

FERGUSON and ROBERTSON, JJ., concurred.

PALFRAMAN'S CASE (AND OTHERS').

William Palframan, Maria Gamble, Alexander Turpel, and John R. Murray, all made claims for total disability benefits under policies or certificates for \$1,000 each, issued by the Massachusetts Benefit Life Association, containing this clause:—

“In the event of said member becoming totally and permanently disabled, and the determining of such disability by the medical director and board of directors of said association, there shall be paid to said member, at the option of said board, if he shall so request in writing at any time while this policy is in full force, upon the surrender to said association of this policy and the cancellation of the same, in full discharge and settlement of all claims under this contract, the sum of \$500.”

These claims did not accrue until after the making of the order for the winding-up of the association, and were first made to the liquidator.

Statement. The Master found that the claimants were not entitled to maintain their claims for disability, and disallowed the same, but did not determine whether the claimants were totally disabled or not, that question being in the meantime reserved.

The claimants appealed, and their appeals were heard by a Divisional Court composed of BOYD, C., and FERGUSON, J., on the 21st February, 1899.

J. J. Macleennan, for William Palframan, *J. D. Montgomery*, for Maria Gamble and Alexander Turpel, and *Starr*, for John R. Murray, contended that the discretion of the liquidator or of the Court should be substituted for that of the medical director and board of directors, they having ceased to exist, and the claimants should be allowed to give evidence of total disability. They referred to R. S. C. ch. 129, secs. 31 (b), 56; Niblock on Mutual Benefit Societies, pp. 371-3.

Watson, Q.C., for the liquidator.

March 13, 1899. BOYD, C.:—

Before this claim was made for total disability, the winding-up order had issued. The effect of that order was to destroy the functions of the directors and officers of the company, and practically to determine the contract contained in the policy of life insurance: *In re Albert Life Assurance Co.* (1870), L. R. 9 Eq. 706; R. S. C. ch. 129, sec. 15.

The clause of the policy now invoked provides that in the event of the said member becoming totally disabled, and the determining of such liability by the medical director and board of directors, there shall be paid to the member, at the option of the board, if he shall so request in writing at any time while this policy is in full force, upon the surrender to said association of this policy and the cancellation of the same, in full discharge and settlement of all claims under the contract, the sum of \$500.

There are many objections to the application of this clause in the present case after the winding-up order. The fact of disability has first to be determined by the medical director and board of directors. This is a condition precedent and has not been, and I suppose cannot be, complied with: *Darnley v. Proprietors of London, Chatham, and Dover Railway* (1867), L. R. 2 H. L. 43. And again, the whole matter rests upon the option of the board after such prior determination of total disability; and the board is not now competent to exercise any such option. Again, the payment of the smaller total disability amount is to be in consideration of the cancellation of the policy for \$1,000, but this state of affairs has all been changed by the collapse of the company. The provisions of the policy are framed to meet the case of a solvent and active company.

I agree, therefore, with the ruling that the applicant has no right to prove as for total disability, and dismiss the appeal, but no costs. This to be without prejudice to his proving for damages or otherwise on his policy: *In re Albert Life Assurance Co.—Bell's Case* (1870), L. R. 9 Eq. 706; R. S. C. ch. 129, sec. 108.

FERGUSON, J., concurred.

E. B. B.

Judgment.

Boyd, C.

RE BELL.

Will—Restraint on Alienation—Validity—Attempt to Alien—Forfeiture—Heirs-at-law.

A testator devised land to his three sons, in equal shares, in fee simple, adding, "without power to them, or any of them, to charge or alien the same or any part thereof except by * * will:"—

Held, following *Re Winstanley* (1884), 6 O. R. 315, a valid restraint on alienation.

The three sons were the sole heirs at law of the testator. After becoming entitled to the possession of the land under the devise, they joined in a mortgage of it in fee to a stranger. One of the three then contracted to sell his share to the other two:—

Held, that each of the devisees, by making the mortgage, had forfeited his estate under the will, and each had become entitled as heir at law to an undivided third of the whole, and therefore the vendor could make a good title in fee simple to his undivided share to his brothers, the purchasers.

Statement.

THIS was a petition under the Vendors and Purchasers Act, heard by STREET, J., in the Weekly Court, on the 1st March, 1899. The facts are stated in the judgment.

Idington, Q.C., for the vendor.

A. W. Ballantyne, for the purchaser.

The following cases were referred to: *McRae v. McRae* (1898), 30 O. R. 54; *Earls v. McAlpine* (1881), 6 A. R. 145; *Re Northcote* (1889), 18 O. R. 107; *Re Shanacy and Quinlan* (1897), 28 O. R. 372; *Re Thomas and Shannon* (1889), 30 O. R. 49; *Re Winstanley* (1884), 6 O. R. 315; *Chisholm v. London and Western Trusts Co.* (1897), 28 O. R. 347; *Smith v. Faught* (1881), 45 U. C. R. 484; *Heddlestone v. Heddlestone* (1888), 15 O. R. 280.

March 16, 1899. STREET, J.:—

Leaving out certain stipulations which have no effect upon the present question, the testator devised to his three sons the land in question, in equal shares, in fee simple, adding these words, "without power to them or any of them to charge or alien the same or any part thereof except by their last will and testament." The three sons

are the only children and the sole heirs at law of the testator.

Judgment.

Street, J.

After becoming entitled to the possession of the land under the devise, the three devisees joined in a mortgage in fee of it to one Robert Munro.

One of the sons has entered into a contract to sell his share to the other two; and the question as to his power to make a good title under his contract is the matter now raised under the Vendors and Purchasers Act.

The cases bearing upon the validity of such a restriction upon alienation as that contained in the present will are not to be reconciled.

I think the decision of the Chancery Division in *Re Winstanley* (1884), 6 O. R. 315, is strictly in point here. It was there held that a condition attached to a devise in fee restraining alienation by the devisee in any manner, excepting by will, was valid.

Until that case is overruled by a higher Court, I think I am bound to follow it and to disregard the cases in which its principle has not been followed.

I, therefore, hold that the restriction here is a valid restriction in form.

It imposes a condition upon the estate of each of the three devisees that he shall not charge or alien his undivided share except by his last will and testament. Each of the devisees has, however, broken the condition and has forfeited the estate which he took under the will, by making a mortgage on the land.

It is unnecessary to consider whether a sole devisee upon such a condition, being also sole heir at law, could enter under the will, then break the condition, and enter as heir at law for condition broken. If he could, then when these devisees broke the condition, they became entitled as heirs at law; if he could not, then as each of the three devisees forfeited in turn the estate devised to him, his two brothers and co-heirs became entitled to the estate so forfeited, and the result was a mere nominal shifting of the undivided shares, the three brothers each

Judgment. still retaining an undivided third of the whole: *Earls v. Street, J. McAlpine* (1881), 6 A. R. 145.

I am of opinion, therefore, that the vendor here can make a good title in fee simple to his undivided share of the property to his brothers, the purchasers, who should pay the costs of the petition.

E. B. B.

[DIVISIONAL COURT.]

IN RE THE CENTRAL BANK OF CANADA.

Company—Winding-up—Balance in Hands of Liquidator—Payment Out to Receiver-General—R. S. C. ch. 41—52 Vict. ch. 32, sec. 20 (D.).

By virtue of 52 Vict. ch. 32, sec. 20 (D.), the Divisional Court has jurisdiction to entertain an appeal from the ruling and decision of the Master in Ordinary, on a reference to him under that section.

The judgments of the Court of Appeal and of the Supreme Court in this case (24 A. R. 470, 28 S. C. R. 192), are conclusive on the point that the moneys repaid into Court in this matter, pursuant to those judgments, after having been erroneously paid out to certain applicants, being the balance unclaimed in the hands of the liquidator by an insolvent bank after passing their final accounts, were the property of the Receiver-General of Canada under R. S. C. ch. 129, sec. 41, subject to the liability of paying it over to the persons entitled thereto.

Statement. THIS was an appeal from the Master in Ordinary under the following circumstances:—

An order having been made by the Court of Appeal in this matter (24 A. R. 470), for the repayment by the executors of Hogaboom into Court of the moneys therein referred to; and that order having been confirmed by the Supreme Court of Canada (28 S. C. R. 192, under the title of *Hogaboom v. The Receiver-General of Canada*), and having been complied with by the executors, an application was made on May 13th, 1898, to Mr. Justice Ferguson, sitting in Chambers, by the liquidator appointed by the Court, for an order providing for the disposition of the money so paid into Court. After hearing the liquidator in person,

and counsel for the Receiver-General of Canada and for the executors of the Hogaboom estate, an order was made "that it be referred to the Master in Ordinary to inquire and state who are entitled to, or to share in, the moneys in Court to the credit of this matter, upon notice to the Receiver-General of Canada, the executors of the Hogaboom estate, the representative of the creditors of the said bank, and to such other persons, if any, as to the Master in Ordinary may seem proper."

This order was carried into the office of the Master in Ordinary, who on June 22nd, 1898, after hearing argument, delivered the following reasons:—

June 22nd, 1898. THE MASTER IN ORDINARY:—

It is clear from what was stated during the argument in this case that there are disputed claims, and perhaps disputed rights, between the creditors and shareholders of this bank respecting the fund in Court, which must be ascertained and adjudicated upon before the fund can be finally distributed amongst the parties to whom it belongs. And Mr. Justice Maclellan in the Court of Appeal has expressed his opinion that, when the money was originally paid in in 1892, it clearly belonged to the creditors, for they had not been paid in full; but that if they did not choose to claim it, it could be claimed by the shareholders: 24 A. R., at p. 475.

It is conceded that it does not belong to the Crown; because if paid over to its officer, the Minister of Finance and Receiver-General, he would receive and hold it as statutory liquidator or trustee for the persons entitled, and, if so paid over, that officer would take it *cum onere*, with the burden of contestations of fact and law, for the determination of which he has no judicial powers, either in the taking of evidence, or in adjudicating upon such claims and rights, and from whose decisions no rights of appeal are prescribed,—except perhaps by an action against him as a statutory liquidator or trustee for the persons entitled; or by a petition of right if the payment to him is claimed to make the fund a part of the Consolidated Revenue.

Master in
Ordinary.

Again, should the Minister find his administration of the fund impeded by such contestations, and that he had no judicial powers to administer oaths, hear evidence, and decide questions of fact, he would either have to apply to a Dominion, or to a Provincial Court to relieve him of the contestations; and request such Court to call upon the parties to prove their claims. And it would be within his right to apply to this Court, which, for the purposes of the Act, has been constituted a Dominion Court for the winding up of this insolvent Bank.

I have held in other cases, especially in *Re Farmers' Loan and Savings Co., Ex parte Toogood*,* that this Court is constituted under the Winding-up Act, R. S. C. ch. 129, the *forum domesticum* for all matters relating to the realization and distribution of the assets of insolvent companies; and that in adjudicating upon the rights of parties it possesses not only its ordinary judicial powers as a Court of Justice (section 90), but also the special judicial powers conferred by the Act, many of which judicial powers may be exercised by summary proceedings, instead of in long spun out actions, as indicated by sections 39, 48 and 83, and more fully explained by the Lord Justices in *In re Mercantile Trading Co., Stringer's Case* (1869), L. R. 4 Ch. 475.

One branch of the ordinary jurisdiction of the Court relates to the distribution of moneys which come into its custody, or under its control. Where moneys have been paid in to the credit of a cause or matter, against which it is known that there are contested claims; or where the claimants' rights are doubtful, it is not the course of the Court to pay them out to any private or official person without first ascertaining the proper claimants, and adjudicating upon their rights and shares in such moneys.

And it is sometimes the course of the Court where a fund has been some years in Court (as this may be said to have been), to require that all the parties beneficially

*April 12th, 1898, unreported.

interested in the fund should be notified: *Edwards v. Harvey* (1863), 7 L. T. N. S. 662, 9 Jur. N. S. 453. Master in Ordinary.

This fund is now in Court under 55 & 56 Vict. ch. 28, (D.), which directs that it shall be distributed by or under the direction of the Court among the persons entitled thereto in the same way as nearly as may be, as if the distribution was made by the liquidator. Such appears to be the view expressed in this case by Mr. Justice Gwynne, in the Supreme Court, when he says: "the money paid into Court became, by the statute, money in Court upon the trust purposes named in the statute": 28 S. C. R., at p. 205.

Recognizing, therefore, these moneys as trust moneys in Court, I think the statutory duty to distribute the moneys as the liquidator should, cannot be ignored or transferred by the Court to an officer who has no judicial functions, and who is not "an officer of the Court" within sec. 20 of 52 Vict. ch. 32 (D.), to whom its judicial powers may be delegated.

The order of the Court in this case is in the usual form for the ascertainment of parties entitled to moneys in Court; for it directs me to enquire and state who are entitled to, or to share in, the moneys now in Court, and orders that the said moneys, with accrued interest, be paid out to the parties found entitled thereto, who, according to Mr. Justice Maclellan are either the creditors or shareholders of this insolvent bank.

I must, therefore, obey the mandate of the Court and ascertain the individual parties who are entitled to these moneys, and the amounts of their respective claims.

The learned Master delivered to the solicitor for the Receiver-General a certificate of his ruling as follows:—

"I certify that pursuant to the order made herein, dated the 13th day of May, 1898, I was attended by counsel for the Honourable the Minister of Finance and Receiver-General of Canada, and for creditors of the Central Bank of Canada, and for the executors of the will of the late George A. Hogaboom, and by George S. Holmsted, the

Master in
Ordinary.

liquidator appointed by the order of November 21st, 1892, and that after hearing the said parties and the evidence and orders and proceedings in this matter, I ruled that the moneys in Court to the credit of this matter are, pursuant to the Dominion Statutes, 55 & 66 Vict. ch. 28, and the said order, made on May 13th last, to be distributed by this Court among the persons entitled thereto in the same way as nearly as may be as if the distribution were made by the liquidator; also that such distribution is to be made before any portion of such moneys which may not be required for any other purpose authorized by the said Act can be deposited in a Bank or paid over with interest to the said Minister of Finance and Receiver-General pursuant to the 40th and 41st sections of the Winding-up Act.

Dated this 22nd day of June, 1898."

The Receiver-General appealed from this finding to the Divisional Court, and the appeal was argued on December 14th, 1898, before FALCONBRIDGE and STREET, JJ.

F. E. Hodgins, for the Receiver-General, contended that there must be a time when a balance of money in a winding-up, having lain for three years in the bank, shall, under R. S. C. ch. 129, secs. 40, 41, and 94, go to the Receiver-General, subject to outstanding claims; that the Receiver-General had litigated at his own risk to get back the money when wrongfully paid out; and now no one else was claiming it; and that in England such moneys would be paid over to the Board of Trade without question: *In re Stock and Share Auction and Banking Co.*, [1894] 1 Ch. 736; *In re Boneli's Electric Telegraph Co.* (1874), L. R. 18 Eq. 656.

J. K. Kerr, Q. C., for the creditors, contended that the order of FERGUSON, J., of May 13th, 1898, was conclusive; that the intention of the Winding-up Act was that the fund should be distributed as the liquidator would have distributed it; and the order substituted the Court for the Receiver-General.

Harcourt, for the liquidator.

Argument.

Hodgins, in reply, contended that the intention of the Winding-up Act was that money not then required by the Court for any purpose authorized by the statute, should be paid into the bank, and remain there for three years subject to the jurisdiction of the Master; but that if it were not claimed and successfully claimed during the three years, it should be paid over to the Receiver-General.

The judgment of the Court was delivered on January 30th, 1899, by

STREET, J. :—

A preliminary objection to the right of a Divisional Court to entertain the present appeal was mentioned to the Court by counsel for the liquidator and creditors. The objection is founded upon the provision of secs. 74 and 77 of the Act, R. S. C. ch. 129.

By section 74, it is provided that "Any person dissatisfied with an order or decision of the Court or a single Judge in any proceeding under this Act, may, by leave of a Judge of the Court, appeal therefrom * * if the amount involved in the appeal exceeds five hundred dollars."

Sub-section 2. "Such appeal shall lie in Ontario to the Court of Appeal for Ontario."

Section 77. "The powers conferred by this Act upon the Court may, subject to the appeal in this Act provided for, be exercised by a single Judge thereof, etc.

2. "In the Province of Ontario such powers may, subject to an appeal according to the ordinary practice of the Court, be exercised by * * the Master in Ordinary * * ."

Sub-section 2 of sec. 77, is repealed by sec. 20 of ch. 32. 52 Vict. and the following clause is substituted :—

"After a winding-up order is made the Court may from time to time by order of reference refer and delegate

Judgment. according to the practice and procedure of such Court, to
Street, J. any officer of the Court any of the powers conferred upon the Court by this Act or any Acts amending the same as to such Court may seem meet, subject to an appeal according to the practice of the Court in like cases."

Under the ordinary practice of the Court an appeal lies from the Master in Ordinary to a Divisional Court, and in my opinion the present appeal comes within the amended sub-sec. 2 of sec. 77, and is properly before us. The intention of the Act seems to be that appeals from judgments of the Court itself or a Judge of the Court must go direct to the Court of Appeal, but that appeals from an officer of the Court to whom duties under the Act have been delegated are to be heard before the Court or a Judge according to the practice of the Court.

Upon the main question it appears to me that we are concluded by the judgments of the Court of Appeal and of the Supreme Court upon the question of the ownership of this money. Mr. Justice Maclellan in his judgment, reported at p. 475 of vol. 24 of the Ontario Appeal Reports, after setting forth the facts of the case and the law applicable to them, sums up his conclusions as to the ownership of the fund as follows:—"When the first order was made the Receiver-General had an inchoate contingent right which would become absolute in October, 1895, in case the money was not in the meantime claimed by creditors or shareholders, and when the second order was made, that right had become absolute." The right here referred to is described in a preceding sentence of the judgment as the right of the Receiver-General to have the money paid over to him under section 41 of the Act.

The Chief Justice of the Court of Appeal says, at p. 473 of the same report, that he agrees in the conclusions of Mr. Justice Maclellan, and Mr. Justice Osler does not express his dissent from them, although his concurrence is perhaps a limited one.

In the Supreme Court the judgment of the Court was delivered by Mr. Justice Gwynne, who, at p. 206 of vol. 28

S. C. R., says: "As to the objection that the Receiver-General had no *locus standi in curiâ*, while I concur in Mr. Justice Maclellan's judgment that under the statute he had, I must repeat that in my judgment it is quite immaterial whether he had or not."

Judgment.

Street, J.

In the face of these judgments it appears to me to be impossible for us to hold otherwise than that the money in question when paid back into Court by the executors of Hogaboom was the property of the Receiver-General under section 41 of the Act, subject to the liability of paying it over to the persons entitled thereto, and that the jurisdiction of the Court to distribute it was taken away. The order made by my brother Ferguson has not been appealed against, and is binding upon us, but it contains nothing inconsistent with the right of the Receiver-General to require the money in question to be paid over to him after the deductions for costs, etc., which it provides for. What we now decide is that the learned Master in Ordinary should have determined in accordance with the decisions to which I have referred, that the Receiver-General was entitled to the money in Court in accordance with section 41 of the Act. If the Receiver-General desires to dispute the portions of the order which provide for the fixing of an allowance to the liquidator and the payment of costs under the order he must obtain the leave of the Court to appeal against it. So long as it stands we must consider the Receiver-General as assenting to its terms, and as the representative of the creditors appointed by the Court and the counsel for the liquidator properly appeared upon this appeal, we think they as well as the Receiver-General should have their costs of the appeal out of the money in Court.

The appeal is allowed with these provisions as to costs.

A. H. F. L.

[DIVISIONAL COURT.]

ROGERS V. CARROLL ET AL.

Chattel Mortgage—Affidavit of Bona Fides—Variation from Statutory Form—Liability of Indorser—Payment of Notes by Mortgagee—Change in Form of Security—Execution Creditors—Priorities—Assignment for Benefit of Creditors—Preference—Presumption—Rebuttal.

The affidavit of *bona fides* made by the mortgagee in respect of a chattel mortgage given to secure him against liability in respect of his indorsement of certain promissory notes for the mortgagor, contained the expression, "and truly states the extent of the liability intended to be created by such agreement and covered by such mortgage," instead of the statutory words, "and truly states the extent of the liability intended to be created and covered by such mortgage." It also contained this clause: "And for the express purpose of securing me, the said mortgagee therein named, against the payment of the amount of such notes indorsing liability for the said mortgagor:" instead of the words, "and for the express purpose of securing the mortgagee against the payment of the amount of his liability for the mortgagor:—"

Held, that the mortgage was not void as against creditors by reason of these variations from the statutory form.

Boldrick v. Ryan (1890), 17 A. R. 253, distinguished.

The mortgagee, having paid the notes during the currency of the mortgage, before the expiration of a year took and filed a new mortgage upon the same goods for the amount paid by him and interest, changing the form of the instrument so as to make it appropriate to an actual advance of money, but not reciting the prior mortgage or the payment. Within sixty days of this, the mortgagor made an assignment for the benefit of creditors:—

Held, that executions in the sheriff's hands before the second mortgage was filed, but subsequent to the prior mortgage, did not gain priority over the second; and the statutory presumption that the latter was made with intent to prefer was rebutted by the circumstances.

Statement.

AN appeal by the plaintiff in an interpleader issue from the judgment of the Judge of the County Court of Leeds and Grenville finding the issue in favour of the defendants.

Certain goods in the possession of one William Nelson Rogers having been seized by a sheriff under the defendants' executions, they were claimed by the plaintiff, William Graham Rogers, under a chattel mortgage from the execution debtor, his father, and the trial of this issue was directed upon the application of the sheriff.

On the 24th April, 1897, William N. Rogers mortgaged the goods to the plaintiff to secure the latter against his indorsement of certain promissory notes for the accommodation of the mortgagor, and this mortgage was regularly filed in the proper office on the 27th April, 1897. While this chattel mortgage was current, and some time before the expiration of a year from its date, the plaintiff paid and retired the promissory notes which he had indorsed. In order to continue the security, a new mortgage was made by the mortgagor covering the same goods in favour of the plaintiff and duly filed before the expiration of the year, and within thirty days thereof. This mortgage purported to be security for the sum paid by the plaintiff to retire the notes and interest. It did not recite the first mortgage or the payment of the notes. Statement.

The executions of the defendants, or some of them, were in the hands of the sheriff before this second chattel mortgage was made or filed.

Within sixty days after the execution of the second mortgage, the mortgagor made an assignment for the benefit of creditors under the statute in that behalf.

The defendants contested the validity of the first mortgage, on the ground that the form of the affidavit of *bona fides* was not that required by statute; and they also asserted that, even if the first mortgage were valid, it having now expired, their executions had gained priority over the second mortgage; and also that the second mortgage was invalid as having been made with intent to prefer.

The plaintiff's appeal from the judgment finding the issue in the defendant's favour was heard by a Divisional Court composed of BOYD, C., FERGUSON and ROBERTSON, JJ., on the 23rd and 24th February, 1899.

George Kerr, for the plaintiff.

E. D. Armour, Q. C., and *W. B. Carroll*, for the defendants.

Judgment. March 6, 1899. BOYD, C.:—

Boyd, C.

Having considered the decision on the affidavit in *Boldrick v. Ryan* (1890), 17 A. R. 253, I am of opinion that it does not touch the affidavit made in this case. The affidavit of *bona fides* here sufficiently conforms to the requirements of the Act then in force, 57 Vict. ch. 37, sec. 8 (now R. S. O. ch. 148, sec. 8). The only variation is that the first paragraph states that "the mortgage truly sets forth the agreement entered into between me and the said mortgagor, and truly states the extent of the liability intended to be created by such agreement and covered by such mortgage." The Act directs the phrase to be "the extent of the liability intended to be created and covered by such mortgage." As expressed in the affidavit, the liability created by the agreement and covered by the mortgage relates to the same liability, viz., the securing of the indorser against liability on the notes. And the statute is substantially complied with.

The wording in the second paragraph of the affidavit is clumsy, but intelligible. It states that the mortgage was executed for the express purpose of securing the mortgagee against "the payment of the amount of such *notes indorsing liability* for the said mortgagor"—that is, to secure the mortgagee against payment of the liability of the mortgagee on the notes so indorsed by the mortgagee.

The validity of the first mortgage being ascertained, the second was taken in respect of the same transaction, the notes having been paid meanwhile by the mortgagee, and the new mortgage taken for that amount, plus interest at eight per cent. One mortgage overlapped the other in time, so that at no moment was there more than an equity of redemption in the goods in the mortgagor. I do not think the second mortgage can be impeached as a fraud on creditors, if the first mortgage is valid, because, by that, payment of the notes was guaranteed and indemnity covenanted for, which is carried out in substance by the new mortgage. The one cannot be dissevered from the

other in order to let in an execution creditor, and I do not think that the decision of the County Judge can be upheld. Judgment.
Boyd, C.

The goods are bound by the mortgage, and the executions have no hold except upon the equity of redemption, and the answer upon the interpleader should be in favour of the claimant, the mortgagee, to the extent of the amount of the promissory notes paid, with interest thereon at six per cent. The claimant should get his costs of issue and appeal against the creditors.

FERGUSON, J.:—

I am of the opinion that, notwithstanding anything that has been brought forward or contended against the validity of the mortgage firstly given, it was a good and valid mortgage. The contentions against its validity were confined to the affidavit of *bona fides* of the mortgagee. It was said that the proper form of affidavit had not been used, and that the requirements of the statute had not been fulfilled. The case *Boldrick v. Ryan* (1890), 17 A. R. 253, was relied on as shewing that the affidavit was fatally bad. It is true that the affidavit employs the expression “and truly states the extent of the liability intended to be created by such agreement and covered by such mortgage”—the words in the seventh section of the Act then in force—when, in strictness, the expression should have been “and truly states the extent of the liability intended to be created and covered by such mortgage”—the words in the eighth section of the same Act. This same error occurred in *Boldrick v. Ryan* (above), and the fact is somewhat severely commented upon in the judgment of Mr. Justice Osler, but a consideration of the case shews clearly enough that the decision did not rest upon this point at all, but upon a subsequent clause in the affidavit, which was not at all like the subsequent clause in the affidavit in the present case. So long as one is not compelled to hold such a transaction bad, because the very words of the statute have not been used (see the language of Harrison, C. J., in *O'Donohoe v. Wilson*

Judgment. (1877), 42 U. C. R. 329), I am unable to see that the error
Ferguson, J. here should be considered a fatal one.

The other clause or part of the affidavit to which objection is made is: "And for the express purpose of securing me the said mortgagee therein named against the payment of the amount of such notes indorsing liability for the said mortgagor," instead of the words contained in the eighth section of the Act: "And for the express purpose of securing the mortgagee against the payment of the amount of his liability for the mortgagor."

To me it is entirely plain that, when the mortgage and the transaction by it disclosed are looked at, these somewhat different forms of words mean precisely the same thing. In the one used more words are employed than were necessary, but it appears to me impossible that any mistake could be made as to what liability is referred to, and I am of the opinion that the affidavit is not bad by reason of this error.

Then, during the year from the making of the first mortgage, and while it was in full force, the mortgagee was called upon to pay, and did pay, the notes that he had indorsed for the mortgagor. By so doing he became the creditor of the mortgagor. The year was about expiring, and the first mortgage could not, in the circumstances, be conveniently, if at all, renewed under the provisions of the statute in that regard, but the mortgagee was in a position to seize and take the mortgaged goods. Instead of doing or attempting to do either of these, the plan was adopted of giving and taking the second mortgage to secure the debt then owing to the mortgagee, the amount that he had paid in satisfaction of the notes. This was done, and there is no objection to this second mortgage in respect of the requirements of the statute, or any of them, nor is the contention against this mortgage based on any allegation of fraud. It is clear on the facts that the mortgage secondly given and taken was a mere continuance of the security for the same liability, and I am of the opinion that the second mortgage, notwithstanding anything urged

against its validity, was also good and valid. Within Judgment. sixty days after the execution of the second mortgage the mortgagor made an assignment for the benefit of creditors, which raised a presumption (under the statute) that it was made with intent to prefer the mortgagee. This presumption, however, was rebuttable, and to me the facts of the case disclose the reason (a good and substantial one) for giving the mortgage, which rebuts the presumption and repels any inference of intent to prefer. Ferguson, J.

So far as I am able to see, there was continuously from the time of the giving of the first of the two mortgages a good and valid charge upon the property in favour of the mortgagee, the claimant Rogers, and the claims of execution creditors of the mortgagor could bind only the equity of redemption subject to this charge; and, in my opinion, the finding and judgment in the interpleader issue should have been in favour of the plaintiff, the claimant Rogers.

The charging and adding to the debt of the two per cent. over the legal interest may not have been good as against the creditors of the mortgagor, but I see no ground for saying that this was fraudulently done so as to affect the validity of the transaction for the true sum.

I agree in the disposition made as to costs by the judgment of the Chancellor.

ROBERTSON, J.:—

I think there can be no doubt, on the authorities, that the mortgage of the 24th April, 1897, which was the first mortgage taken by the appellant, was good as against creditors; the second was a continuation of that; and the finding of the learned County Court Judge cannot be upheld.

Now, let us see what the first mortgage on its face purports to be. It recites that the mortgagee has indorsed the promissory notes of the mortgagor for \$750, for the accommodation of the mortgagor, copies of which notes are annexed to the mortgage, and are three in

Judgment. number, and all bear date the 23rd day of April, 1897, the
Robertson, J. day before the date of the mortgage. One is for \$100,
payable in one month ; another is for \$100, payable in two
months ; and another is for \$550, at three months—all
payable to the order of the mortgagee, indorsed by him,
and made by the mortgagor. It recites further that the
mortgagor had agreed to enter into these presents for the
purpose of indemnifying and saving harmless the mort-
gagee from the payment of the said notes, or any part
thereof, or any notes to be indorsed by the mortgagee for
the accommodation of the mortgagor by way of renewal
of said recited notes, so that, however, said renewal shall
not extend the time of payment of said notes beyond one
year from the date of the mortgage nor increase the
amount of the liability "beyond the amount of said
interest accruing thereon."

Then the affidavit of *bona fides* says that the mort-
gage truly sets forth the agreement entered into between
me (the mortgagee) and the mortgagor, and truly states
the extent of the liability intended to be created by
such agreement and covered by such mortgage ; that
the mortgage, etc., was executed in good faith and for
the express purpose of securing me, the said mortgagee,
against the payment of the amount of such note indor-
sing (*sic*) liability of said mortgagor, as therein set out,
and not for the purpose of securing the goods against
creditors of the mortgagor, nor to prevent such creditors
from recovering any claims which they have against such
mortgagor.

The Act in force at the date of this mortgage was 57
Vict. ch. 37, and sec. 8 and the preceding sections point
out what is necessary to make a transaction of that kind
valid against creditors ; and it seems clear to me that
the statute has been fully complied with—in fact, the
creditors who are now contesting this matter so treated it
by abandoning a seizure made under their executions some
time after the mortgage was registered and because of it—
and that the mortgage was a good and valid security
against all creditors.

Now, the mortgage being registered or filed in the office of the County Court clerk on the 27th April, 1897, remained good and valid for one year from that date (sec. 14 of the Act). The notes were afterwards paid to the respective holders by the plaintiff, and were not taken up by the mortgagor, so that, when the time came for renewal of the mortgage under sec. 14 of the Act, now the 18th section of ch. 37, R. S. O. 1897, the facts and circumstances had so changed that it became a question as to how the security was to be kept good. Bearing in mind that this mortgage was not given to secure a debt due from the mortgagor to the mortgagee, but to indemnify the latter against having to pay the promissory notes which he had indorsed for the accommodation of the mortgagor, a statement as to what was due on the mortgage could not be made in the terms of the Act. The payment of these notes to the respective holders of the mortgage then created a debt due from the maker to the mortgagee. In order then to continue the security and to comply with the Act, which requires a renewal, a new mortgage was given on the same identical goods, made payable on demand to secure the debt created by the payment of the notes. This mortgage was accompanied by an affidavit of *bona fides*, as required, and in terms of the Act, and duly registered before the expiration of the year, and within thirty days thereof. It was admitted at the trial that the liability against which the mortgagee was indemnified, still existed, but in another shape. He had been obliged to take up the notes, and he held them against the maker, the mortgagor, and it was also admitted that the second mortgage was given to secure the payment of the same notes, and at the time it was given the mortgagee was in a position to seize and sell the goods in satisfaction of what had become a claim for the amount of the notes; but, instead of so doing, the new mortgage is taken, and I am at present at a loss to know why it should not be held to be good. I think it would have been more skilfully drawn if it had recited the first mortgage and the subse-

Judgment.

Robertson, J.

Judgment. Robertson, J. quent facts as regard the payment by the mortgagee of the notes. That would have made it clear on the face of the mortgage. But the creditors were not deceived; they knew the whole of the facts and circumstances; there was no fraud practised in taking the new mortgage; and I think that, on the authority of *Boldrick v. Ryan* (1890), 17 A. R. 253, the plaintiff is entitled to fall back on the previous mortgage; the two mortgages covered the one and the same transaction, and at no time did the right of the execution creditors intervene so as to cut out the plaintiff's security.

For these reasons I agree that the findings of the learned County Judge must be reversed, and judgment entered in favour of the plaintiff on the interpleader issue, with full costs.

E. B. B.

[DIVISIONAL COURT.]

RE FARMERS' LOAN AND SAVINGS COMPANY.

DEBENTURE HOLDERS' CASE.

Company—Loan Company—Winding-up—Creditors—Priorities—Debenture-Holders—Depositors—Power to Pledge Assets—Directors—Form of Debenture—Charge—Nature and Extent of.

The company being in liquidation under the Dominion Winding-up Act, a claim was made on behalf of holders of the company's debentures that they were entitled to a charge on the assets of the company in priority to depositors.

The company was formed on the 19th October, 1871, under C. S. U. C. ch. 53, by sec. 38 of which the right of a society formed under it to borrow money, if authorized by its rules to do so, was recognized.

By rule 7 of the company, passed under the authority of sec. 2 of ch. 53 C. S. U. C., the directors were authorized to borrow money for the use and on the assets of the company, to receive money on deposit, and to "loan" or invest such money either on mortgage on real estate or in any other way they might think best for the interests of the institution:—

Held, that the company was invested with the power to borrow money for its purposes, and to give security upon its assets for the payment of the money borrowed.

Murray v. Scott (1884), 9 App. Cas. 519, followed.

And this power to pledge the assets was one which might be delegated to the directors under C. S. U. C. ch. 53, sec. 5.

The debentures upon which the claimants relied were headed "Land Mortgage Debenture," and contained a promise by the president and directors to pay to the person named a certain sum at a particular time and place, with interest, and were signed by the president and secretary, under whose signatures were the following words: "The payment of this debenture and the interest thereon is guaranteed by the capital and assets of the company invested in mortgages upon approved real estate in the Dominion of Canada:"—

Held, that these instruments created a charge upon the property of the company.

Per ROSE and MACMAHON, JJ., that such charge was upon the capital and assets of the company invested in mortgages on approved real estate situate in the Dominion of Canada at the date of the winding-up order.

Per MEREDITH, C.J., that the charge was such as entitled the debenture holders to be paid out of the assets of the company in priority to the depositors and other creditors.

Ruling of the Master in Ordinary reversed.

IN the winding-up of the company under the Dominion Statement.
statute R. S. C. ch. 129, before the Master in Ordinary, the holders of the company's debentures asserted a claim to priority over the depositors. The Master ruled against this claim, and in doing so delivered the following opinion, in which the facts are stated.

Master in Ordinary. June 16, 1898. Mr. HODGINS, Q. C., Master in Ordinary :—

The claim for priority of the debenture holders over the depositors in this case is based upon certain additions to the statutory form of the debenture, of which the following is a sample :

“ LAND MORTGAGE DEBENTURE.

Debenture No. 1. Transferable.

Under the authority of an Act of the Parliament of Canada, 37 Vict. ch. 50, and also under the authority of the Revised Statutes of Ontario ch. 164.

The president and directors of the Farmers' Loan and Savings Company promise to pay to the Reverend John Wright, of Marionville, Lasswade, Scotland, the sum of one hundred pounds sterling, on the eleventh day of November in the year of our Lord one thousand eight hundred and eighty-two, at the National Bank of Scotland in London, with interest at the rate of five per cent. per annum, to be paid half yearly on presentation of the proper coupon for the same as hereunto annexed, say on the fifteenth day of May and the eleventh day of November in each year.

Dated at the city of Toronto, Province of Ontario, Canada, the first day of April, 1880.

For the Farmers' Loan and Savings Company.

[Seal]

(Sgd.)

P. Howland, President.

(Sgd.)

Geo. S. C. Bethune, Secretary.

The payment of this debenture and the interest thereon is guaranteed by the capital and assets of the company, invested in mortgages upon approved real estate situate in the Dominion of Canada.”

The additions to the statutory form are the words “ Land Mortgage Debenture,” at the top, and the words, “ the payment of this debenture and the interest thereon is guaranteed by the capital and assets of the company, invested in mortgages upon approved real estate situate in the Dominion of Canada,” at the foot, and below the signatures of the president and secretary.

Master in
Ordinary.

It is claimed on behalf of the debenture holders that these two additions to the statutory form, together with certain by-laws of the company, give these debentures a first charge on so much of the assets of this company as are represented by mortgages on real estate ; or make such a representation as may be enforced against such assets in equity. In considering this claim it will be necessary to trace the statutory history of the borrowing powers of these companies, and of the security guaranteed for the money so borrowed.

The first Act giving legislative recognition to building societies was passed in 1846, 9 Vict. ch. 90, which recited that it was desirable to encourage the establishment of certain societies, commonly called building societies, for the purpose of raising by small periodical subscriptions a fund to enable the members thereof to obtain unincumbered freehold or leasehold property.

In 1859 their power to "borrow money" was recognized by 22 Vict. ch. 45, sec. 3, but within certain financial limits, and on the security of certain assets, as follows : "Every such society, by its rules, regulations and by-laws authorized to borrow money, shall not * * borrow, receive, take or retain, otherwise than in stock and shares in such society, * * any greater sum than three-fourths of the amount of capital actually paid in on unadvanced shares, and invested in real securities by such society." And as security for such borrowed and received money it was declared that "the paid in and subscribed capital of the society shall be liable for the amount so borrowed, received or taken by such society."

This statutory declaration of the security for such borrowed and received (or deposited) money mortgaged the capital stock of these societies, and ear-marked it as a trust fund for the benefit of the persons from whom such money was obtained.

These Acts were the statutory ancestors of C. S. U. C. ch. 53, from which, and their statutory descendants, these building societies derive their corporate life and financial powers.

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The above statutory ear-marking of the security for borrowed money appeared in ch. 53, as sec. 38, and has been continued with slight amendments in R. S. O. 1877 ch. 164, sec. 41; R. S. O. 1887 ch. 169, sec. 55; and R. S. O. 1897 ch. 205, sec. 28.

The term "securities" used in the original Act of 1846 was defined by sec. 16 of that Act as extending and applying to privileges, mortgages (equitable as well as legal), and incumbrances upon real and immovable estate, as well as to other rights and privileges upon personal estate and property; and this definition has been continued in C. S. U. C. ch. 53, sec. 35; R. S. O. 1877 ch. 164, sec. 1 (4); R. S. O. 1887 ch. 169, sec. 1 (4); and R. S. O. 1897 ch. 205, sec. 1 (18).

In 1865 these borrowing powers were restricted by 29 Vict. ch. 38, sec. 7 (proviso) to the following class of societies:—

"No such society hereafter to be established shall borrow money or receive deposits until not less than one hundred thousand dollars of stock shall have been subscribed, and not less than forty thousand dollars shall have been actually paid thereon." This provision was continued in R. S. O. 1887 ch. 169, sec. 56, sub-sec. 3.

No particular mode of borrowing money, other than what may be inferred from the words "borrow money or receive deposits," had been specified in the Acts, but in 1869 it was decided in *Snarr v. Toronto Permanent Building and Savings Society* (1869), 29 U. C. R. 317, that a building society might assume the power to issue promissory notes, or other negotiable instruments, for the purpose of borrowing money, under C. S. U. C. ch. 53, sec. 38.

Up to 1874 no constitutional shoals rendered the legislative stream of building society law, though tortuous, very difficult. During this year the Dominion Parliament by 37 Vict. ch. 50 (D.), repealed sec. 38 of C. S. U. C. ch. 53, and substituted a clause (sec. 6) authorizing building societies to receive money on deposit, and also to issue debentures within certain specified limits as to investments on

mortgages and permanent capital; but it did not re-enact that the paid in and subscribed capital should be liable for the amounts so borrowed. The proviso declaring that the aggregate amount of money deposits, together with the amount of the debentures, should not exceed the amount of principal due on mortgages, and the amount of capitalized stock, may be read as affirming that such should be the securities for the moneys borrowed under both modes. The statute also prescribed a form of debenture.

During the same session an Act was passed authorizing this company to change its name to the one it now bears (37 Vict. ch. 102 (D.)), which change was confirmed by the Ontario Act 39 Vict. ch. 32.

And here it may be noted that a similar legislative declaration as to security for borrowed money appears in the Dominion Act regulating building societies in Quebec, 40 Vict. ch. 50, sec. 13, sub-sec. 6 (D.), "That no building society shall have power to receive money on deposit, or issue debentures, unless upon the responsibility of its permanent capital stock."

In 1876 the Legislature of Ontario re-enacted, in 39 Vict. ch. 32, many of the provisions of the Dominion Act ch. 50 of 1874; but it did not repeal sec. 38 of C. S. U. C. ch. 53, which had defined and ear-marked the security or trust fund for "borrowed money." It also confirmed any debentures issued and acts done by such companies under the Dominion Act, and adopted the Dominion form of debenture.

In 1877 the Dominion Parliament and the Ontario Legislature passed Acts giving increased borrowing powers to building societies. The former (40 Vict. ch. 49 (D.)), amended as to twenty per cent. stock by 47 Vict. ch. 40 (D.)), provided that the amount of money deposits and the amount of debentures might be equal to double the amount of the unimpaired permanent stock of the society; that the deposits should not exceed the unimpaired capital; and that the total liabilities should not exceed the amount of principal unpaid on the mortgages held by such society. The

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Ontario Act (40 Vict. ch. 22 (O.)) enacted substantially similar provisions.

In 1877 the whole body of Provincial law regulating building societies in Ontario was consolidated in R. S. O. 1877 ch. 164, in which the ancestral clause (sec. 38 of C. S. U. C. ch. 53) with its statutory descendants—which prescribed the limits of their borrowing powers, and declared that the security for borrowed money should be the paid in and subscribed capital of the society—was re-enacted (sub-secs. 41, 52-55). The debenture quoted above recites that it is issued under the authority of this and the Dominion Act, and must be read as incorporating their provisions into its contract.

With the exception mentioned above, I think that up to the date of the issue of this debenture (1880), the Provincial and Dominion laws were substantially the same.

The question now to be considered is whether this company had power to vary, or did vary, the statutory form of their debentures so as to give to the lenders of money under debentures priority of charge on its assets over the lenders of money by deposits, as claimed by the debenture holders in this contestation.

It will be conceded that there is no express statutory provision giving priority of charge or preference, or delegating power to these societies to give such priority of charge or preference, to any class of their creditors. Rather a negative of any such priority or preference appears to be deducible from the statutes; for by authorizing two modes of borrowing and receiving money from the public,—debentures and deposits,—by designating the security for the money so borrowed and received; and by restricting the total liabilities of the society (*i.e.*, under debentures and deposits) to “the amount of principal unpaid on the mortgages held by the society,” both Legislatures have indicated that the favourite and equitable policy of the law should govern the distribution of the assets of these societies; and that such assets should form

a trust fund out of which all their creditors shall be paid ratably and without preference or priority.

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But it is claimed that, in addition to the powers incident to their franchise, these building societies were authorized to deal with, treat, sell, and dispose of the lands, property, and effects of the society, in such manner as they may deem expedient, as if the same were held and owned, according to the tenure, and "subject to the liabilities affecting the same," not by a body corporate, but by any of Her Majesty's subjects of full age. And it is argued that this power enabled them to deal with their properties in the same way that a person of full age might deal with his property.

The argument is pressed too far. Even if the expressed statutory restriction, "subject to the liabilities affecting the same,"—which means, subject to the statutory liabilities affecting the same,—had been omitted, the company could only exercise the power to deal with its property according to and within the limits prescribed by the statutory rules affecting it. In this case there are clear statutory rules defining (1) the several modes by which money could be borrowed, (2) the limit of amount up to which money could be borrowed, and (3) the security guaranteed to those from whom the borrowed money had been obtained. If one of these statutory rules can be varied, so may all. To the power to deal with its property as "a person of full age," is appended the restriction I have quoted, thus expressly importing these statutory rules regulating its borrowing power, and also implying a negative on any right to violate such rules, or to vary the one which guaranteed an equal charge on its assets to all its creditor-lenders, that its paid in and subscribed capital should be liable for the moneys lent, deposited, or borrowed within the limits prescribed by law. And this statutory guarantee or charge was, I think, imported into this debenture by its recital of the statute in which the security was stated. I must therefore hold that the words and representations added to the statutory form of the

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debenture, in so far as they are assumed to import a contract, which conflicts with the provisions of the statute, are *ultra vires* of the company, and void.

Further, the by-law of the company number 7, intituled "Power to borrow or receive money on deposit," furnishes an additional argument:—"The directors are authorized to borrow money for the use and on the assets of the company; to receive money on deposit in large or small sums * * and to loan or invest such [borrowed and deposited] money either on mortgage on real estate, or in any other way they may think best."

The priority claimed by these debenture holders over their co-contributors, the depositors, if conceded, would give their debentures a first charge on all the mortgage securities in which the moneys obtained from the depositors, as well as from the debenture holders, under by-law number 7, had been invested; and would deprive such depositors of their proportionate share of the moneys they had contributed under that rule for investment in such mortgage securities; and would divert, or practically misappropriate, their investments to the payment of debentures, to which they were no parties, and for which they were not liable,—postponing them as subsequent incumbrancers on whatever residuum of such securities should be available after the payment of the debenture holders;—and this without their consent or any statutory grant of priority, or any notification of a risk of postponement of their proportion of the moneys invested in such mortgage securities.

For these reasons, I must hold that to allow the claim of priority made by the debenture holders would be to give judicial sanction to the larceny from the statutes of the security guaranteed since 1859, equally to debenture holders and depositors from whom this company has obtained money for the purposes of its business.

The result is that debenture holders and depositors are entitled to rank *pari passu* on the assets of this company.

Certain of the debenture holders appealed against this decision, and their appeal was heard by a Divisional Court composed of MEREDITH, C.J., ROSE and MACMAHON, JJ., on the 9th and 10th December, 1898. Argument.

J. T. Small and *R. B. Henderson*, for the appellants. The Master was of opinion that this company was a creature of the statute, and unless the statute gave it power to borrow and give security for the loan upon its assets, it had no such power; that the only power was under sec. 38, and the effect of the last words of that section was to give a charge to all lenders alike, including depositors. The answer to this is, that the statute does not in fact create such a general charge, and that to induce the Court to come to the conclusion that the capital cannot be specially charged, there must be a clear and necessary implication to that effect from the words of the statute. The question for the Court is not: Is it possible to infer against the right to charge? But: Are we forced to infer against it? *In re Patent File Co.* (1870), L. R. 6 Ch. 83; *Newton v. Debenture Holders, etc., of Anglo-Australian Investment Co.*, [1895] A. C. 244; *In re Mayfair Property Co.*, [1898] 2 Ch. 28; *Re Pyle Works* (1890), 44 Ch. D. 534. By virtue of sec. 2 of the Act, the rules and by-laws of the company become part of the Act, like the articles of association in England. By sec. 38 the rules might authorize borrowing. By rule 7 the directors are authorized to borrow on the assets of the company, and by rule 54 to sign securities: see *Snarr v. Toronto Permanent Building and Savings Society* (1869), 29 U. C. R. 317. The Imperial statute 6 & 7 Wm. IV. ch. 32 is almost the same as our Act of 9 Vict., and the English authorities shew plainly that among the rules the company could make were rules authorizing the directors to borrow and pledge the company's assets as security: *Murray v. Scott* (1884), 9 App. Cas. 519; *Re Strand Music Hall Co.* (1865), 3 DeG. J. & S. 147; *Cradock v. Scottish Provident Institution* (1893), 69 L. T. N. S. 380; *Keith v. Burrows* (1876), 1 C. P. D. 722, 731. If the company had power to borrow,

Argument. this particular instrument created a good charge: *In re Florence Land and Public Works Co.—Ex p. Moor* (1878), 10 Ch. D. 530.

Glyn Osler (with him *Wallace Nesbitt*), for other debenture holders, supported the appeal, and referred as to the construction of the words at the foot of the debentures, to *Foot v. Webb* (1866), 29 Barb. (N.Y.) at p. 52; *Flagg v. Mann* (1837), 2 Sumn. (U.S. Cir.) at p. 533; and to the *Century Dictionary* as to the meaning of the word “guarantee.”

J. K. Kerr, Q.C., and *William Macdonald*, for the London and Lancashire Insurance Company and other depositors. There is no evidence here that any debenture holder had any stipulation for a charge, apart from the delivery of the document to him. The method in which debentures are issued must be considered. These documents are not evidence of intention to do anything beyond what they actually do: *Brooks v. Blackburn Benefit Society* (1884), 9 App. Cas. at p. 865. The corporation has no power outside of what is given to it by statute in express terms or to be inferred from powers which are given: *Wenlock v. River Dee Co.* (1885), 10 App. Cas. 354; *S. C.* (1887), 36 Ch. D. at p. 685—not inconsistent with *Bickford v. Grand Junction R. W. Co.* (1878), 1 S. C. R. 696. *Norton v. Florence Land and Public Works Co.* (1877), 7 Ch. D. 332, is almost exactly like this case, and it is in our favour. The same case in 10 Ch. D. is different, because there the articles of association were considered—and we have nothing equivalent here. We rely on the *Florence* case to shew that the debentures here do not create a charge. See also *Re Colonial Trusts Corporation* (1879), 15 Ch. D. at p. 468; *Buckley’s Companies Acts*, 6th ed., p. 168; *Re Horne and Hellard* (1885), 29 Ch. D. 736, 742. If the construction of the instrument is doubtful, all the surrounding circumstances must be looked at.

W. N. Miller, Q. C., for the Dominion Bank.

W. M. Douglas and *F. B. Osler*, for the liquidator.

Small, in reply.

February 14, 1899. MEREDITH, C. J. :—

Judgment.

Meredith,
C.J.

These appeals are by debenture holders from the ruling of the Master in Ordinary against their claim to be entitled to a charge on the assets of the company in priority to depositors.

The company was formed under the C. S. U. C. ch. 53, on the 19th October, 1871, and among its rules, passed under the authority of sec. 2, is the following:—

“7. The directors are authorized to borrow money for the use and on the assets of the company, to receive money on deposit in large and small sums, and to pay such interest therefor and under such regulations as they may from time to time deem advisable, and to loan or invest such money either on mortgage on real estate or in any other way they may think best for the interests of the institution.”

It has been determined by the highest authority (*Murray v. Scott* (1884), 9 App. Cas. 519) that such a company, if authorized by its rules to do so, may borrow money for the purposes of the company, and may charge or pledge its assets for the payment of the money borrowed.

The original Building Societies Act, consolidated with the Acts amending it by the Act already referred to, was 9 Vict. ch. 90, the provisions of which, as far as they affect the present inquiry, are substantially the same as those of the Imperial Act (6 & 7 Vict. ch. 32) upon which the questions arose which were under consideration in *Murray v. Scott*, with the following exceptions:—

(1) The Imperial Act did not, as the Upper Canada Act does, create the members of the society a body corporate.

(2) The Upper Canada Act (C. S. U. C. ch. 53) expressly recognizes the right of a society formed under it to borrow money, if authorized by its rules to do so, by providing in sec. 38 as follows:—

“38. Every such society by its rules, regulations and by-laws authorized to borrow money, shall not borrow, receive, take or retain, otherwise than in stock and shares

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in such society, from any person or persons, any greater sum than three-fourths of the amount of capital actually paid in on unadvanced shares, and invested in real securities by such society; and the paid in and subscribed capital of the society shall be liable for the amount so borrowed, received or taken by any society."

Besides this recognition of the power of the society to pass such rules, the subsequent legislation has practically converted what were originally building societies into loan companies, and has conferred largely increased borrowing powers upon them.

It is clear, therefore, I think, that this company was invested with the power to borrow money for its purposes, and to give security upon its assets for the payment of the money borrowed, and it follows, I think, that such security might be given in the form of a mortgage or pledge of or charge on the whole or any part of the assets of the company, whether existing when the security was given or subsequently acquired, or in the nature of what is known as a "floating security" upon the assets, present and future.

That this is the result of the decision in *Murray v. Scott* is manifest, I think, because the rule which was under consideration in that case professed to give to the lenders of the money a first charge for it upon the property of the company, and that charge was held to be a valid one. If the members might create such a charge, I know of no principle of law which, even if no express power were given to do it, would prevent them from conferring on the trustees or directors the authority to create such a charge, and that they may do so is expressly provided by sec. 5.

It was argued, however, that the effect of sec. 38 is to give a statutory charge on the capital of the company to persons from whom the company borrowed money, either by receiving it on deposit or otherwise, for the money lent, and that this statutory charge has priority over any charge or security created or given by the company, and to that argument the learned Master has given effect.

I am unable to agree with this view as to the effect of
sec. 38. Judgment.

It may be difficult to ascertain with certainty the purpose which the Legislature had in view in enacting the provisions of sec. 38. Meredith,
C.J.

It may have been, as was argued by Mr. Small, with the intention of preventing a society from returning to its members who desired to withdraw their shares, instead of making them fixed or permanent, the amount paid in by them, to the prejudice of those who had lent money to the society, or it may have been to leave no room for doubt that it was not to the trustees but to the capital of the society, paid in and subscribed, that persons lending money to it must look for the repayment of the money lent. The fact that the members of the society are made a body corporate does not necessarily exclude the latter view, for it is to be remembered that the Act was framed substantially on the lines of the Imperial Act, which required the society to act in the name of its trustees, in whom its property was vested, and that while the members are by the Upper Canada Act created a body corporate, as I have already mentioned, the property of the society is vested in its president and treasurer (sec. 27), and by sec. 31 the president, vice-president, and directors of the society, in their private capacity, are exonerated from all responsibility in relation to the liabilities of the society.

Language very similar to that which is used in sec. 38 is found in the policies of some insurance companies, and it was at one time contended that the effect of it was to create a charge on the property referred to, but it was ultimately held that no charge was created by the language used.

In one of the reported cases, *Re State Fire Insurance Company* (1863), 1 H. & M. 457; S. C., 1 DeG. J. & S. 634; some of the policies in question provided "that the capital stock and funds of the company shall be subject and liable to pay" the sum insured. They contained also a proviso that the capital stock and funds of the company should alone

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C. J.

be answerable for all demands, and that no director, officer, or member of the company, or proprietor of shares therein, should be responsible or liable beyond the amount of his particular share. In some of the policies the proviso was somewhat more strongly worded, "that no director or proprietor of the company shall be individually responsible." It was held that no lien or charge was created by these policies, and that the effect of the language used was to provide "that the property of the company should be liable to the payment of the sum assured just as in the case of a contract with a creditor that the property and not the person of the debtor should be liable for the debt."

To the same effect is the decision of Vice-Chancellor James in *Bell's Case* (1870), L. R. 9 Eq. at p. 720; and in *In re Sovereign Life Assurance Co.*, [1892] 3 Ch. 279, Lord Justice Lindley, delivering the judgment of the Court of Appeal affirming the decision of Mr. Justice Chitty, said that the law on the subject was settled thirty or forty years before, after much litigation, both at law and in equity, and he stated that the settled law, as far as it bore on the case then under consideration, might be thus expressed:—

"(1) The policy holders acquire no charge at law or in equity upon the funds of the company;

(2) Their right (when their policies become payable or provable against the company) is to be paid out of the then existing funds of the company, including its then uncalled-up capital;

(3) They have no right to call upon any shareholder to pay more than the full amount of the shares held by him and unpaid up when the demand is made upon him."

There were, no doubt, in these cases circumstances which helped to the conclusion which was come to which do not exist in the present case, but there are sufficient points of resemblance remaining to warrant the conclusion that upon the language of sec. 38 no lien or charge upon the capital of the company is given to persons lending money to it, and that its purpose was merely to designate the

capital as the fund out of which the debt due to the lender was to be paid, as in the case of a married woman having separate estate, that estate is the fund from which alone the debt is to be paid, and possibly, as I have said, to prevent a member of the company withdrawing his investment to the prejudice of the lender.

Judgment.
Meredith,
C.J.

Having come to this conclusion, it is unnecessary to consider the difficult question raised as to whether the effect of the Dominion Act (37 Vict. ch. 102) was not to withdraw the company from provincial jurisdiction and the operation of provincial legislation, and to subject it thereafter to the jurisdiction and legislation of the Dominion Parliament, because, apart from the provisions of sec. 38, the legislation is in both cases, as far as it affects the rights of the parties which are now in question, substantially the same.

I am inclined to think, however, having regard especially to the provisions of sec. 3, that if the effect of the special Act be to constitute the company a Dominion corporation, and to withdraw it from provincial jurisdiction and the operation of provincial legislation, the company nevertheless remained subject to the provisions of sec. 38 of the Upper Canada Act. The company as a Provincial corporation derived its being from Provincial legislation, and for the nature and extent of its powers, as they existed when the Dominion Act took effect, reference must be had to the provincial legislation; in other words, I take it, the effect of the Dominion legislation, if it was effective at all, was to create the company a Dominion corporation, invested with all the rights and powers which it then had under the provincial law, just as if the company had originally been created by special Act of the provincial Legislature conferring those rights and powers upon it.

I come now to the consideration of the second and more difficult branch of the case.

The question to be determined is whether the debentures issued by the company, all of which are in the same form, create a charge on the property of the company, and

Judgment. if they do, what is the nature and extent of the charge created.
Meredith,
C.J.

The instrument is headed "Land Mortgage Debenture ;" it is numbered, and is stated to be issued "under the authority of an Act of the Parliament of Canada, 37 Vict. ch. 50, and also under the authority of the Revised Statutes of Ontario ch. 164 ;" it is in form a promise by the president and directors of the company to pay to the person named as payee the sum for which the debenture is issued, at a time and place named, with interest at a named rate, payable half-yearly on presentation of the proper coupon annexed to it ; it is signed by the president and secretary, and the seal of the company is affixed, and it is also, when issued in Great Britain or Scotland, countersigned by the local director there ; and immediately below the signature of the president and secretary are the words following : "The payment of this debenture and the interest thereon is guaranteed by the capital and assets of the company invested in mortgages upon approved real estate in the Dominion of Canada."

The language of the instrument is open, as it appears to me, to three possible meanings :—

(1) That the capital and assets of the company are invested in mortgages upon approved real estate in the Dominion of Canada, and that this fact affords a guarantee to the holder of the debenture that the principal and interest payable according to its terms will be paid, and that in this sense the debenture is a land mortgage debenture.

(2) That the payment of the principal and interest is secured upon the capital and assets of the company, which are stated to be invested in mortgages upon approved real estate in the Dominion of Canada, the latter words being used, not as limiting the security to the moneys so invested, but as a representation by the company that the capital and assets upon which the charge is created are invested in that kind of securities.

(3) That the payment of the principal and interest is

secured upon so much of the capital and assets of the company as is invested in mortgages upon approved real estate in the Dominion of Canada.

Judgment.
Meredith,
C.J.

The third of these constructions suggested as possible to be put on the instrument seems to me to be the least likely to have been that which was intended by the contracting parties, and that which the language used least accords with.

It is, I think, more probable that if it was intended to create a charge, the charge was one which would embrace all the assets of the company rather than so much of them as might from time to time be invested in mortgages, and so to leave it in the power of the borrower to reduce the security of the lender as he might see fit by changing the investments from mortgages to debentures of municipal corporations or of public school corporations, or Dominion or provincial stock or securities—R. S. O. 1877 ch. 164, sec. 21—or to loans on unadvanced shares—sec. 43. I can hardly imagine that a lender, having this Act referred to on the face of his debenture, would have taken the risk of his security being lessened or probably entirely destroyed by the borrower exercising his right to change the character of the investments so as to produce that result.

I have difficulty, too, if the security is to be so limited, in holding the charge to be a floating security. There are, upon such a construction, no words referring to future investments in mortgages, and I do not see how they can be implied. Where the security is upon the undertaking or upon the capital and assets, the almost necessary inference is that the assets as they may exist when the security is to be enforced are that which is to be the security. If the language does not imply that the security is to be a floating one, I have difficulty in conceiving that the company would give a security which would prevent their dealing with their securities as the necessities of their business might require, or that a lender would run the risk of his security being destroyed, or that lenders would

Judgment. be found when the debentures must have priority according
Meredith, to their respective dates of issue, and a complicated and
C.J. difficult inquiry would be necessary, in case the securities
were changed, or there were successive issues of debentures,
to determine the security to which each debenture holder
was entitled.

The words "invested * * upon approved real estate" are also to my mind indicative rather of an intention to describe the kind of securities in which the company made the investment of its capital and assets—mortgages * * upon approved real estate—than as descriptive of the subject matter of the security.

Being of this opinion, my choice must be between the first and second of the suggested constructions, and I have come to the conclusion that the second is the one which should be adopted.

The instrument, as has been seen, is described as a "land mortgage debenture." Had the word "land" been omitted, this description would point plainly to a well known form of security, a debenture which is both an obligation for the payment of the money which is payable by the terms of it, and a mortgage on the property of the company by which it is issued, or some part of it, or secured by such a mortgage, and the addition of the word "land" appears to me to be indicative of the nature of the property on which the mortgage is represented to exist.

What then is the meaning fairly to be attributed to the words added at the foot of the instrument, "the payment of this debenture and the interest thereon is guaranteed by the capital and assets of the company invested in mortgages upon approved real estate in the Dominion of Canada?"

The position which the provision occupies in the instrument is, I think, immaterial, as it forms an integral part of the debenture. The words "guaranteed by" are, or at least may be, the equivalent of the words "secured upon," and had that form of expression been used, there would be no

room for doubt, I think, that the words would amount, if not to a direct charge on the capital and assets of the company, to a representation that the debentures were secured in that manner, and a contract with the payee of the debenture that he should have that security for the payment of the debenture money and interest.

Judgment.
Meredith,
C.J.

It is unnecessary to refer to all of the authorities which were cited on the argument to support the proposition that such language as I have indicated will create a floating charge on the company's property. It will suffice to refer to three of them.

In *In re Panama, New Zealand, and Australian Royal Mail Co.* (1870), L. R. 5 Ch. 318, the debenture was headed "mortgage debenture," and by it the company charged its "undertaking, and all sums of money arising therefrom, and all the estate, right, title, and interest of the company therein," with the repayment of the money borrowed and interest thereon, and it was held by the Court of Appeal, affirming the judgment of Vice-Chancellor Malins, that the debenture holders acquired a charge upon all the property of the company, past and future, and that they were entitled to be paid out of the property of the company in priority to the general creditors.

In *In re Florence Land and Public Works Co.—Ex p. Moor* (1878), 10 Ch. D. 530, the instrument, which was called an "obligation," was expressed to be made under the power of the company's articles, which gave to the directors power to borrow money by mortgage on any part of the company's property, or by bonds, debentures, or mortgage debentures, which should entitle the holders to be paid out of the moneys, property, and effects of the company *pari passu*, and by the obligation the company bound themselves, their successors and assigns, and all their estate, property, and effects, to repay the sums mentioned therein at a future date. It was held that the obligation constituted a charge on the property of the company, subject to the power of the directors to dispose of any part of it in the ordinary course of their business; the Master of the Rolls (Sir

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C.J.

George Jessel) came to this conclusion, reading the obligation with reference to the articles of association, but Lord Justice James was of opinion that upon the construction of the obligation itself, without reference to the articles, except as to whether the obligation was *intra vires*, there was sufficient to constitute a charge upon the property of the company, and Lord Justice Thesiger agreed in the result without expressing any opinion as to the latter point.

In *In re Colonial Trusts Corporation* (1879), 15 Ch. D. 465, the debenture was in the form of a bond, and by it the company "obligated" for payment of the debenture and interest the real and personal estate of the company. It was held that this created a floating security covering the company's property as it stood at the moment when the business was put an end to, but did not cover the uncalled capital of the company, as that was not "property" of the company.

Had the language in question in this case been used in a prospectus and not found a place in the debenture, there would be more room for the argument that it was intended merely to convey information to those who were invited to deal with the company by lending money to it upon its debentures, as to the nature of the securities in which the company invested its capital and assets, and to the "moral" security that was thus afforded for the payment of the debentures and interest; but found as the provision is on the face of the debenture itself, it cannot, I think, be so treated, and must be taken to have been intended to be, as I have said, at least a representation by the company that the payment of the debenture and interest thereon was secured upon the capital and assets of the company, and a contract that it should be so secured.

Assuming, however, that the language of the debenture is not such as in terms to create a charge on the capital and assets of the company, the case of *In re Strand Music Hall Company, (Limited)* (1865), 3 DeG. J. & S. 147, is an authority for my last proposition. In that case the directors of the company borrowed £5,000, under a written

agreement with the lender, one of the terms of which was that two hundred mortgage bonds of £50 each, "forming part of £25,000 of mortgage bonds constituting a first charge on the property of the company," should be deposited with the lender as collateral security for the loan, which was secured by two promissory notes of £2,500 each, and it was held that, as the directors had power to charge the property of the company, and the intention to create the charge appeared from the agreement, a valid charge was created, though the mortgage bonds were invalid through incompleteness.

The principle of this decision is, I think, clearly applicable to the present case, if I am right in the view that the debenture contains a contract with the debenture holder that he shall have, as security for the payment of his debenture and interest, the capital and assets of the company.

The same principle was applied in *Town of Dundas v. Desjardins Canal Company* (1870), 17 Gr. 27, to the case of a canal company which had executed a bond which did not contain direct words of charge, but stated that the receiver was "entitled to such security therefor (*i.e.*, money lent) as is mentioned in the said recited Act." The Act which authorized the borrowing provided that "all such bonds or mortgages * * shall take precedence and have priority of lien on the said canal and the tolls thereon, and other property of the company over all claims," etc., and it was held that, beyond doubt, the holders of the bonds were entitled to a charge on the canal and tolls and to the appointment of a receiver therefor.

So also in *Ross v. Army and Navy Hotel Co.* (1886), 34 Ch. D. 43, where the debentures were issued with a condition annexed that the holders of the debenture bonds of that issue were entitled *pari passu* to the benefit of a "covering deed" to secure the payment of all moneys payable on the debenture bonds, it was held that, assuming the covering deed to be void for want of registration under the Bills of Sale Act, the intention to give the

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C.J.

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debenture holders a valid charge on the property comprised in the deed was manifest on the face of the debentures, read in conjunction with the annexed condition, and amounted to an equitable contract which would be carried into effect to give a charge upon all the property of the company; and, accordingly, that the chattels intended to be charged with the money due on the debentures were subject to an equitable charge in favour of the holders of those debentures.

I refer also upon this point to *In re New Durham Salt Co.* (1890), 35 Sol. Jour. 24; Brice on Ultra Vires, 3rd ed., pp. 233, 234.

If the language of the instrument were more ambiguous than I think it is, the case is, in my opinion, one for a liberal application of the principle of taking words "*fortius contra proferentem*."

The ruling of the Master in Ordinary should, therefore, in my opinion, be reversed, and there be substituted for it a declaration that the debenture holders are entitled to be paid out of the assets of the company in priority to the depositors and other creditors. The costs of the appeal should, I think, be paid out of the moneys in the hands of the liquidator.

ROSE, J.:—

This company was incorporated under C. S. U. C. ch. 53, as we find from the preamble of 37 Vict. ch. 102. By sec. 2 of ch. 53, the members of building societies therein referred to were empowered to make such proper rules for the government of the society as the majority of the members might deem meet, so as such rules were not repugnant to the provisions of the Act or any law in force in Upper Canada.

By sec. 5, every society was empowered to appoint directors, and to delegate to them all or any of the powers given by the Act to be executed; (sec. 6) such powers to be declared by the Rules. By sec. 38, the power to make

rules, regulations, and by-laws authorizing a society to borrow money was recognized. See *Snarr v. Toronto Permanent Building and Savings Society* (1869), 29 U. C. R. 317, for a judicial declaration of the existence and extent of such power, where Wilson, J., said: "They may provide for the society borrowing money if they wish."

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The company passed rules, a copy of which has been filed. The exact date of passing does not appear, but from an entry in a book in the possession of the liquidator, entitled "By-laws of the Farmers and Mechanics' Loan & Savings Company," which follows the last rule therein written (No. 50), it would appear that they were passed prior to the 16th January, 1872. Rule 7 is as follows: "The directors are authorized to borrow money for the use and on the assets of the company, to receive money on deposit in large or small sums, and to pay such interest therefor under such regulations as they may from time to time deem advisable, and to loan or invest such money either on mortgage on real estate or in any other way they may think best for the interest of the shareholders."

By this rule passed under the statutory provisions above set out, the directors were empowered to borrow on the security or pledge of the assets of the company, and to receive deposits, but were not empowered to give any security or pledge for the repayment of such deposits. While in one sense receiving money on deposit may be borrowing, the members evidently treated it as a different thing, and in the rule made different provisions respecting deposits and borrowed money.

It may be that if we knew the history of rule 7 it would be found to have been taken from the articles of association of some unincorporated society enrolled under 6 & 7 Wm. IV. ch. 32. Lord Blackburn deals with the powers of the directors of such societies to borrow and charge assets in *Murray v. Scott* (1884), 9 App. Cas. at p. 547. He there says: "The members might if they pleased authorize them to do so, so as to charge not only the funds

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of the society, but also their individual responsibility. It would be very injudicious to do so, but they might do it. I do not think that even before *Cox v. Hickman* (1860), 8 H. L. Cas. 268, it could have been held that they became partners, and so necessarily gave the authority. They might also (I am still speaking of matters as they were before the statute was passed) authorize the managers to borrow money from those who were willing to lend it, on the terms that the lenders should have a charge on the funds of the society and on the unpaid subscriptions of the shareholders, but should have no recourse against the members further than the society or its trustees had recourse against them, yet give them no authority to borrow on any other terms." Having in view these observations, such a rule passed by such a society might well be read as giving the directors power to borrow "on the assets of the company" and on no other terms. But, as the company in question was incorporated, and as its shareholders would not be liable further than the company or the Court on a winding-up might have recourse against them, it seems to me it cannot be supposed to have been passed to protect the shareholders, but that it was passed to empower the directors to borrow money and to give security for the same, *i.e.*, borrow on the assets of the company. Whether this gave a power to pledge specific assets or only to give a floating charge, it will be necessary hereinafter to consider. Section 31 of the Act exonerated the president, vice-president, and directors of the society, in their private capacity, from all responsibility in relation to the liabilities of the society.

As to the effect of the rule giving power to borrow on the assets of the company, much that was said by James, L. J., in *Re Florence Land and Public Works Co.—Ex p. Moor* (1878), 10 Ch. D. 530, would apply. I make the following extracts: "Now it appears to me that it could scarcely be possible that any human being lending money could suppose that he was lending money without any security at all, or that the company could suppose that they were get-

ting money without any security:" p. 545. "Then what is the meaning of binding the estate, property, and effects of such a company as this? In my opinion, the reasonable meaning, the only meaning which the persons who took it (*i.e.*, the bond or debenture) would have attached to it, was, that the words 'estate, property, and effects' were in fact exactly equivalent to the word 'undertaking,' which we find in the other cases, that is to say, it was to be, so far as the company could make it, a special charge upon the assets of the company, the assets which would be forthcoming at the time when the charge was to be made available; it was to be a special charge upon the assets in priority to the general creditors of the company:" p. 546.

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Rose, J.

Applying this language to the construction of this rule, and reading the rule as if it authorized the directors to borrow money and give a charge or security on the assets of the company, it seems to me that it empowered the directors to "charge the undertaking" of the company, or to give a special charge upon the assets, or any specific portion of them, in priority to the general creditors of the company.

It was admitted on the argument that if the rule gave a power to pledge the assets for money borrowed, there would be power to assign a mortgage by way of security.

It was urged that sec. 38, as found in ch. 53, shewed that the intention of the Legislature was that all borrowed money, including deposits, should be a charge upon the paid in and subscribed capital of the company, so that the persons from whom the money was "borrowed, received or taken" by the society should have a charge in their favour.

This language certainly is apposite to cover the case not only of money "borrowed" as usually understood, but also of money "received or taken" by way of deposit, and I think fairly must be so read. The section is as follows:

"38. Every such society, by its rules, regulations and by-laws authorized to borrow money, shall not borrow, receive, take or retain, otherwise than in stock and shares in such society, from any person or persons, any greater

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sum than three-fourths of the amount of capital actually paid in on unadvanced shares, and invested in real securities by such society; and the paid in and subscribed capital of the society shall be liable for the amount so borrowed, received or taken by any society."

It will be observed that this is not an enabling section. It does not profess to give either the power to borrow or to give security. The power to borrow is recognized. If there is power to give security, it must depend on the general provisions of the Act, the nature of the business to be done, and implication of law.

The right to borrow is limited as stated. While this affords security to the persons lending, by preserving a wide margin of safety, it does not by itself make the claims of such lenders secured claims.

But what meaning should be given to the words "and the paid in and subscribed capital of the society shall be liable for the amount so borrowed, received or taken" by the society? Would not such capital be liable without that declaration? I think the reason for passing the section may be found in the preamble to 22 Vict. (1859) ch.45, which is as follows: "Whereas under an Act passed in the ninth year of the reign of Her Majesty intituled an Act, etc., certain building societies have been called permanent building societies, which have in a great measure superseded these societies called terminating building societies, and are conducted on more certain and equitable principles than the said terminating building societies, by enabling persons to become members thereof at any time for investment therein or to obtain the advance of their shares or share by giving security therefor, and to fix and determine with the said society the time and amount which such members shall repay such advanced share or shares and obtain the release of the said security, without being liable to the contingency of losses or profits in the business of the said society; And whereas doubts have arisen as to whether such permanent building societies are within the meaning and intention of the said recited Act;

And whereas it is expedient to remove such doubts and to encourage building societies established on the said permanent principle: Therefore," etc.

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The preamble, as will be apparent, is very loosely worded, but probably the meaning is plain. To carry out the intention recited, that the members holding advanced shares should not be entitled to profits or liable to losses, it was declared in sec. 3 that as to borrowed money, paid in and subscribed capital shall be liable—and by rule 2 we find that "the capital stock of the company shall consist of the unadvanced shares of the members thereof either fully paid up and invested as paid or permanent capital or in course of accumulation." And this I think is made more certain when we look at 37 Vict. ch. 50, sec. 6 (D.), repealing sec. 38 of ch. 53, C. S. U. C., and substituting a new section. I am assuming, without deciding, that the new section and not the old applies to this company. The section is as follows:—

"38. It shall be lawful for any such society to receive money on deposit, and also for the board of directors of any such society to issue debentures of such society for such sums, not being less than one hundred dollars, and in such currency as they may deem advisable, and payable in the Dominion of Canada or elsewhere not less than one year from the date thereof: Provided always that the aggregate amount of money deposits in the hands of such society, together with the amount of debentures issued and remaining unpaid, shall not at any time exceed the amount of principal remaining unpaid on the mortgages at such time held by such society, and shall not exceed the amount of capitalized, fixed and permanent stock in such society, not liable to be withdrawn therefrom, by more than one-third of the total amount of the said capitalized stock: Provided further, that the amount of cash actually in the hands of any such society, or deposited in any chartered bank, shall be deducted from the sum total of the liabilities which such society may be authorized to incur as above stated."

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It will be observed that the concluding words of the repealed section are omitted, because, as it would seem, of the passing of sec. 2 of the same Act, which declared that "no shareholder of any such society shall be liable for or charged with the payment of any debt or demand due by such society, beyond the extent of his shares in the capital of such society not then paid up," which, read with rule 2, clearly shewed that only the "capital," *i.e.*, unadvanced shares, were liable, so that it was unnecessary to continue the declaration that "the paid in and subscribed capital should be liable."

If I am right as to this, the words in question were not inserted to give any charge upon the assets or any portion of them, but were to declare in effect that in seeking payment the lenders of borrowed money should look to the unadvanced shares and not to the advanced shares. This would leave such creditors free to resort to all other remedies and all other assets. It will be observed that the section did not declare that the assets should be liable, but only the capital.

It will be apparent, therefore, that as to the question under consideration the new section made no difference in the rights of the parties.

But it was said that ch. 50 of 37 Vict. was *ultra vires* the Dominion Parliament, as such Legislature had no power to enact concerning building societies having a provincial charter. It is, however, fortunately unnecessary to determine this question, because, if *intra vires*, there was, as I have endeavoured to shew, no change effected by Dominion legislation; and if *ultra vires*, the provincial legislation also effected no change, the old sec. 38 remaining, as may be seen in the R. S. O. 1887, until 1897, when the Act 60 Vict. ch. 38 (O.) was passed, which, however, did not "enlarge, impair, or diminish the duly authorized powers" of the company as given by sec. 38: see sec. 26 of 60 Vict.

As far as this society was concerned, it was argued that the broad question need not be considered if ch. 102

passed by such Parliament in the same year (1874) was *intra vires*, and changed the society from a provincial to a federal corporation, and it was urged that it was *intra vires* and had the effect suggested. It was pointed out that, although the recital sets out that the Farmers and Mechanics' Loan and Savings Company petitioned only for a change of name, the Act not only authorized such a change, but in the second section "constituted" and "continued" the company "a body politic and corporate under the name specified * * * having its principal place of business in the city of Toronto; and, under that name," (it was declared) "shall be capable of suing and being sued, pleading and being impleaded in all Courts and places whatsoever."

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It was also argued that there could be little doubt as to the effect of the Act, even if it had stopped there, but that by clause 3 it was declared that "the said company, under its new name, shall not be deemed to be a new corporation, but it shall have, hold and continue to exercise all the rights, powers and privileges that shall previously to such change have heretofore been held, exercised and enjoyed by the said Farmers and Mechanics' Loan and Savings Company, in as full and ample a manner as if the said company had continued to exist under its original name; and all statutory provisions applicable to the said company shall continue applicable to the said company under its new name." If the argument should prevail, then the effect of the declaration was merely to continue the old entity into the new one; to create a federal corporation thereafter subject to federal legislation, and to withdraw it from the jurisdiction of the provincial Legislature.

Some support to this position might possibly be had by reference to the Judicature Act of Ontario, 44 Vict. ch. 5, sec. 9, which declares that the High Court shall be deemed to be and shall be a "continuation" of the Courts of Queen's Bench, Chancery, Common Pleas, and Courts of Assize, Oyer and Terminer and Gaol Delivery, under the name of the High Court of Justice for Ontario. And see *Regina v. Beemer* (1888), 15 O. R. at p. 271.

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If the contention on behalf of the debenture holders as to this is right, it would be unnecessary to refer to the provincial statutes passed after 1874.

But, for the reasons I have given, I think we are not called upon to decide the question.

Then, if rule 7 was intended to give to the directors the power to pledge the assets, was that power one given by the Acts of incorporation which might be delegated to the directors under the provisions of sec. 5 of ch. 53, C. S. U. C.?

The principle of decision as to the power to pledge, charge, or mortgage, governing this Court, is to be found in the judgment of the Court delivered by Strong, J., in *Bickford v. Grand Junction R. W. Co.* (1878), 1 S. C. R. at pp. 729-730. I extract the following passages: "It cannot be successfully contended, in the face of many decisions to the contrary, both in England and America, of Courts of the highest authority, that a statutory corporation is incapable of mortgaging its property, unless its incapacity to do so is either expressly declared, or is to be gathered by implication from the terms of the Act of incorporation. In other words, no enabling power is requisite to confer the authority to mortgage, but *prima facie* every corporation must be taken to possess it: *Ashbury Carriage Co. v. Riche* (1875), L. R. 7 H. L. 653; *Re Patent File Co.* (1870), L. R. 6 Ch. 83; *Scott v. Colburn* (1858), 5 Jur. N. S. 183; *McCormick v. Parry* (1852), 7 Exch. 355; *Pennock v. Coe* (1859), 23 How. 117, 128; *Dunham v. Cincinnati, Peru, etc., R. W. Co.* (1863), 1 Wall. 254, 267; *Galveston R. R. v. Cowdrey* (1870), 11 Wall. 459, 474; *Australian, etc., Co. v. Mounsey* (1858), 4 K. & J. 733. If its rights in this respect are limited, it must be by force of some disability imposed by the instrument creating it, whether that instrument be a statute or a royal charter; and such a disability may be deduced either from the object of the corporation being limited to certain specific objects, or from its property being subject to charges or trusts in favour of the public with which a mort-

gage would be inconsistent." Now, here there is nothing in the Act of incorporation or subsequent Acts expressly declaring an incapacity to mortgage, nor do I see anything that may be deduced from the objects of the incorporation being limited to certain specific objects, nor do I find that its property is subject to charges or trusts in favour of the public with which a mortgage would be inconsistent.

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The powers given by the Act are very large (see sec. 8 of 37 Vict. ch. 50), and by implication the right to give securities for money borrowed for the purpose of investments is recognized: see sec. 19.

By sec. 8 the powers of the president, vice-president, and directors are declared, and amongst others it is said that "they may generally deal with, treat, sell and dispose of the lands, property and effects of such society * * as if the same lands, property and effects were held and owned according to the tenure and subject to the liabilities, if any, from time to time affecting the same, not by a body corporate, but by any of Her Majesty's subjects being of full age." In the *Bickford* case, *supra*, at p. 736, somewhat similar powers are dealt with, as follows: "* * By sec. 9, sub-sec. 2, of the General Railway Act, C. S. C. ch. 66, express power is conferred upon the company to alienate, sell and dispose of lands which they may have acquired for the construction, maintenance, accommodation and use of the railway. * * That the words 'alienate, sell or dispose' include a power to mortgage as well as that of absolute disposition, requires no demonstration."

By sec. 19 the society is required to transmit to the Minister of Finance annual statements shewing, amongst other things, "the amount borrowed for the purposes of investments and the securities given therefor."

In *Re Pyle Works* (1890), 44 Ch. D. at p. 583, Lindley, L.J., in speaking of the Companies Act, 1862, says: "That the Act contains no clause forbidding mortgages of assets, although every mortgage withdraws from the unsecured creditors that which, but for the mortgage, would be distributable among them in a winding-up. So far from forbid-

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ding mortgages, the Act of 1862, sec. 43, requires limited companies to keep a register of all mortgages and charges of their property; from which it is obvious that such mortgages were contemplated. The members are left to decide for themselves what powers of mortgaging they will confer on their directors."

I therefore conclude that the Acts referred to conferred on the company the power to borrow and the power to pledge or charge the assets by way of security; and that the members of the company delegated such power to the directors.

By sec. 5 of ch. 102, 37 Vict., it was declared that "all the then existing by-laws and rules of the said Farmers and Mechanics' Loan and Savings Company shall continue in full force and effect," etc.

It does not appear, as far as this company was concerned, that it was necessary to declare, as was done in the new sec. 38 introduced by ch. 50 of 37 Vict., that "it shall be lawful for any such society to receive money on deposit and also for the board of directors of any such society to issue debentures," the company having such powers conferred upon the directors by rule 7, for if the directors might borrow, they, of course, could give debentures without express authorization. Section 38, if it applied to this company, merely provided the limit beyond which it might not go in receiving deposits and borrowing money on debentures. I cannot see how providing by that Act a form of debenture can affect the questions under consideration or give any ground for arguing that sec. 38 by implication negatived any power to mortgage or pledge or charge, for a debenture, simply, is, of course, not a pledging or charging instrument, and the pledging or charging might be by any form of instrument, including a debenture, if apt words were introduced.

But assuming the power to pledge or charge, what was the effect of the instrument in question?

One was exhibited as a sample, and was in form as follows:—

LAND MORTGAGE DEBENTURE.

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Pounds
100
Sterling.

FARMERS'

Pounds
100
Sterling.

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LOAN AND SAVINGS

Debenture No. 122. COMPANY. Transferable.

Under the authority of an Act of the Parliament of Canada, 37 Vict. ch. 50, and also under the authority of the Revised Statutes of Ontario, ch. 164.

The President and Directors of the

FARMERS' LOAN AND SAVINGS COMPANY

promise to pay to James Adam Brown, Esq., C. A., No. 14 Chester street, Edinburgh, and Robert Pringle, Esq., W. S., No. 3 Queen street, Edinburgh, trustees under the contract of marriage entered into between Mr. and Mrs. John McKerrell Brown, dated 22nd June, 1847, the sum of one hundred pounds sterling on the fifteenth day of May, in the year of our Lord one thousand eight hundred and ninety-one, at the National Bank of Scotland in London, with interest at the rate of four and a half per cent. per annum, to be paid half-yearly on presentation of the proper coupon for the same as hereunto annexed, say on the fifteenth day of May and the eleventh day of November in each year.

Dated at the city of Toronto, Province of Ontario, Canada, the twenty-eighth day of May, 1886.

For the Farmers' Loan and Savings Company,

(SEAL) Geo. S. C. Bethune, W. Mulock,
 Secretary. President.

The payment of this debenture and the interest thereon is guaranteed by the capital and assets of the company invested in mortgages upon approved real estate situate in the Dominion of Canada.

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Then follow the coupons, in the following form :—

FARMERS' LOAN AND SAVINGS COMPANY.

£2-5-Stg.

Half year's interest due 14th May, 1889, on debenture No. 122, issued by this company on the 28th day of May, 1886, for £100, at four and a half per cent. per annum, payable at the National Bank of Scotland, London.

For the Farmers' Loan and Savings Company,

(Sgd.) Geo. S. C. Bethune,

Secretary.

It is headed "Land Mortgage Debenture." The directors, therefore, by such words, represented to those from whom they desired to obtain money that the instrument they were giving was a security in the nature of a land mortgage. I adapt the language of Jessel, M.R., in *Norton v. Florence Land and Public Works Co.* (1877), 7 Ch. D. at p. 337: 'First of all, and that is a very strong point as between the parties, they themselves call it a land mortgage debenture.'

In *British India Steam Navigation Co. v. Commissioners of Inland Revenue* (1881), 7 Q. B. D. at p. 172, Lindley, J., said: "Now, what the correct meaning of 'debenture' is I do not know. I do not find anywhere any precise definition of it. We know that there are various kinds of instruments commonly called debentures. You may have mortgage debentures, which are charges of some kind on property. You may have debentures which are bonds; and, if this instrument were under seal, it would be a debenture of that kind. You may have a debenture which is nothing more than an acknowledgment of indebtedness. And you may have a thing like this, which is something more; it is a statement by two directors that the company will pay a certain sum of money on a given day, and also will pay interest half-yearly at certain times and at a certain place, upon production of certain coupons by the holder of the instrument."

This instrument was then represented by the company as a debenture which was a charge on land or land mortgages. Then, what was the effect of the statement or declaration or representation that "the payment of this debenture and the interest thereon is guaranteed by the capital and assets of the company invested in mortgages upon approved real estate situate in the Dominion of Canada?" It will be observed that the mortgages are to secure loans of both capital, *i.e.*, money derived from unadvanced shares, and "assets," which would, of course, cover all moneys so invested, whether capital or not, and hence would embrace the very moneys obtained from sale of debentures which should be invested in such mortgages.

Having regard to the name the company chose to give to the instrument, must not, in all fairness, the word "guaranteed" be read as "secured?" If so, then can there be any difficulty in construing the document as a debenture charging the payment of principal and interest upon such of the assets as are invested in mortgages. And in that sense the instrument is not unfairly described as a "land mortgage debenture."

Some assistance is derived from the case of *Brown, Shipley & Co. v. Commissioners of Inland Revenue*, [1895] 2 Q. B. 240, and in appeal 598. The facts as stated in the head-note were as follows: "An American railway company, as security for a temporary loan, handed through their agents in England to the lender an instrument which stated that for value received they promised to pay twelve months after date to the order of themselves the amount named in it. It also contained a statement that it was one of a series, and was secured by a deposit of gold bonds which (or a sufficient amount of their proceeds) were to be held in trust for the benefit of the holders of the instruments." The question in the case was whether the document was a security. In the Divisional Court Grantham, J., refers to the description of debentures given by Lindley, J., in the *Navigation Company* case, above referred to, as reported in 7 Q. B. D., and neatly sum-

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marizes thus: "Either a promise to pay money under seal, or an undertaking to pay it out of the assets of the company, or an undertaking to pay it out of the assets of the company with a promise that no charge shall be created ranking prior to the debenture which has been issued:" and then proceeds, referring to the statement that it was one of a series, etc. :—"In each of those cases the document which is called a debenture is the security for the money advanced, and is the evidence of the title by which the holder is enabled to go upon the assets of the company at large. Does this document enable the holder to do so? Certainly not. It merely says that the company will pay a certain sum of money; while in order to shew the holder that they can really pay it, he is told that by another and entirely different document, a trust deed, they had handed over to trustees certain gold bonds, and that if any of those are sold before the instrument becomes due, the amount for which they have been sold, to the value of that instrument at any rate, is to be either paid to the holder or to be retained by the trustees. Under those circumstances this document is not the security which has secured the money, and the persons who purchase it on the Stock Exchange purchase it on the faith of the statement of this company that they will pay the £2,000 at the due date; they believe that the company have something behind them which will enable them to pay the money." I give the above observations at length, chiefly because they are so much like the argument addressed to us on behalf of the depositors., viz., that the statement on the debentures in question was not part of the document but only a representation, true or false, of an alleged fact; that, if true, it merely stated the rights of the debenture holders as they existed independently of such statement, and added nothing; that, if false, the only remedy the holders had was by an action against the directors, if it would lie; but that this in no wise gave them any mortgage or charge upon the assets.

In the Court of Appeal, however, the view of the Court below was not concurred in. Lord Esher, M. R., said, at p.

600 : "It is contended for the respondents that it is nothing but a statement or representation, and there is no doubt that it is both ; but is it not such a representation as carries with it a promise ? It is in my opinion a representation made to the person who is to lend the money, and is intended to induce him * * to believe that he has a right to the security, and in consequence of it he does believe that he has that right. In my judgment, that is a contract both at law and in equity that he shall have that right, and its effect is to make this document not merely a promissory note, but a promissory note with an additional promise that the holder shall have security ; the document is therefore a security." See also *Ross v. Army and Navy Hotel Co.* (1886), 34 Ch. D. 43, referred to in the above case by Kay, L. J., at p. 602, where he said : "In that case the covering deed was void, because it contained an assignment of furniture and chattels, and was not registered under the Bills of Sale Act, 1882 ; but, nevertheless, the Court held that the debenture on the face of it, by reason of the condition that was placed there to induce people to buy it, contained a contract to give a charge upon all the property of the company, which contract was enforceable notwithstanding that the covering deed was void."

Judgment.

Rose, J.

To constitute a charge in equity by deed or writing, it is not necessary that any general words of charge should be used, but it is sufficient if the Court can gather from the instrument an intention by the parties that the property referred to should constitute a security : *Cradock v. Scottish Provident Institution* (1893), 69 L. T. N. S. 380. *In re Pickard*, [1894] 3 Ch. 704, is quite distinguishable. There the statement was merely "a statement of a fact—a statement of the law applicable to such stock—that the security is so and so : " *per* Lindley, L. J., at p. 708. Here, in my opinion, the statement was not of either a fact or of the law, unless the debenture with such a statement created a charge ; for the statute, as I have endeavoured to shew, did not create any charge.

In the case before us the statement was a representation

Judgment.

Rose, J.

made to the person who was to lend the money, and, in my opinion, carried with it a promise, and gave a right, and the representation, as I read it, was that when the debenture holder required payment, he would find at least a portion of the capital and assets invested in mortgages, and that the moneys so invested would form a fund applicable specially to the payment of the debenture, and not of one debenture only but of all debentures. The debentures were numbered, and thereby the holder was informed that his debenture was one of a series. The charge would be upon the securities in existence when the debentures matured, or at the date of winding-up. In the present case the depositors have not such a charge, and make no claim to one, having, as we were told, proved as unsecured creditors. Therefore the question is simply: Was there a contract made with the debenture holders that, in the event of default in payment of their debentures, they had a right to look to so much of the capital and assets as was invested in mortgages upon approved real estate in Canada—so as to be entitled to have that fund applied first in payment of the debenture debt at the time of the winding-up?

It was much pressed upon us that, even assuming that the words did amount to a charge, it must be upon the mortgages existing at the date of each debenture, as it was sold, securing such debenture, or securing the series at the date of issue, and that such a charge would require the company to keep a separate account with the debentures as issued or sold and with the mortgages then existing, and that if such mortgages were not in existence when default was made, and, as in the present case, the company came to be wound up, then the debenture holders had lost their security, and that at the most their claim, apart from ranking as unsecured creditors, would be against the directors as trustees guilty of a breach of trust in not preserving for them the moneys secured by such mortgages so charged.

With every respect for the opinions of those advancing

such an argument, and with the diffidence that one necessarily feels when quite uncertain whether any one will agree with him in the opinion he has formed, I am bound to say that such a suggestion seems to me at variance with the facts as known to the parties contracting and with the ordinary and known course of business in carrying on the operations of such a company. All parties must be assumed to have known that the business must be carried on by investing money had not only from shareholders but also from depositors and debenture holders, and that such moneys for the greater part would be invested in mortgages of real estate in Canada, that the mortgage moneys would in ordinary course be repaid, and the mortgages discharged, that the moneys when received would be paid into the bank without discrimination and that when new investments were made they would be out of the general fund, without regard to whether any portion of it had previously been invested or whether it was in whole or in part money had from shareholders, depositors, or debenture holders, so that it would be illusory to say to one lending a large sum of money upon debentures: "When you come for your money, if we cannot pay you out of money in hand or in the bank, you may look to a fund invested in mortgages," if such a statement meant that the creditor must shew what mortgages then actually in existence had been in existence at the date of the lending. Rather, it seems to me, the representation was such as I have endeavoured to shew, and that if default was made in repayment by the company the debenture holders had as security such portion of the capital and assets as were then invested in mortgages. And this would be fair to the other creditors, for, by sec. 38 of 37 Vict. ch. 50, the aggregate amount of deposits, together with the debentures issued and unpaid, was, apart from other limitations, forbidden to exceed the amount of principal remaining unpaid on the mortgages at such time held by the society, so that the debenture holders would have security only on a fund equalling the amount borrowed from them, and the depositors would

Judgment.

Rose, J.

Judgment. have ample assets remaining to meet their claims, if there
Rose, J. had been no breach of trust by the directors.

But, assuming that the proper construction should be that the debentures are to rank according to date, no conflict or confusion can arise in the present case, for, as I understood counsel, all the debenture holders claim is that they may rank *pari passu* as among themselves, but in priority to the depositors. If only the moneys invested in mortgages at the date of issue or the date of the debentures is charged, and it is said that the moneys invested in mortgages at the date of the winding-up are not the same moneys as were then invested, it seems to me that those so asserting should bear the *onus probandi*, for as against the company such a burden should not be thrown upon the debenture holders, the difficulty having arisen from the maladministration of the directors: *Attorney-General v. Stephens* (1855), 1 K. & J. at p. 733, referring to *Grierson v. Eyre* (1804), 9 Ves. 341.

What I have said as to the reason why I think that the fund available for payment of the debentures—*i.e.*, all the debentures in existence at the date of winding-up—is, I think, in accordance with what was said by Jessel, M.R., in *In re Florence Land and Public Works Co.—Ex p. Moor* (1878), 10 Ch. D. at pp. 540, 541. I do not quote in full, but only the closing sentence: “But if you read it as making a charge only to this extent, subject to the powers of the directors whilst they are carrying on the business, then if they make default in payment of the principal or interest a creditor can apply to a Court of justice for a receiver and stop them from going on; but subject to that they carry on their business as usual, leaving the creditor to his remedy in case of default, or in case of a total winding-up.” And I desire to adopt the following sentence as expressly applicable to this case: “As I said before, whether it is a right view or not must depend on the Judge who reads the articles.” There does not exist in this case the difficulty in determining what property is subject to the charge, as there did in that case, and therefore I think the order

may be more specific than the one given at the close of the report, on p. 550, and should be as follows: Declare that the land mortgage debentures were a charge upon the capital and assets of the company invested in mortgages on approved real estate situate in the Dominion of Canada at the date of the winding-up order, and that the depositors have not any statutory charge upon such capital and assets or any part thereof. The debenture holders to add their costs to their claims. The liquidator to have his costs out of the estate. The depositors to bear their own costs.

Judgment.

Rose, J.

MACMAHON, J.:—

I agree with the judgment of Rose, J.

E. B. B.

RE CALDWELL
AND
THE CORPORATION OF THE TOWN OF GALT.

Municipal Corporations—By-law Contracting Debt—Publication of—Blank Dates in—Debentures—Interest—Form of By-law—Description of Property Taken—Necessity for Prior Expropriation By-law—Discretion.

It is not essential to the validity of a municipal by-law creating a debt, that a day certain for its coming into force should be stated therein when published and submitted to the ratepayers, as sec. 384, sub-sec. 2 of the Municipal Act, R. S. O. ch. 223, provides that if no day is named it shall take effect on the day of the passing thereof.

Where such a by-law as passed declared the time required by law within which the principal and interest of the debentures should be payable, but the dates of payment were left blank in the copy of the by-law as published, the Court, in the exercise of its discretion, refused to quash the by-law, which was legal on its face.

It is no objection to such a by-law that the enacting clause omits to settle certain specific sums for the payment of the debt and the interest, where the recital and enacting clause read together make clear what is to be done.

But where a by-law was passed to raise money to pay for the opening of a street without any settled plan, shewing the exact position of the intended street, or of the land to be taken, or of the cost of the expropriation, and without a by-law being passed providing for the expropriation of the lands, the Court under the circumstances quashed the by-law with costs.

Statement. THIS was an application to quash a by-law of the corporation of the town of Galt to provide for the issue of debentures to the amount of \$10,000, for the purpose of opening a new street in the town, and for levying the necessary rates for the payment of the same. Another by-law to expropriate the land necessary for the street, with a specific description of the lands required, was subsequently passed but was not in question on this application.

The grounds taken in the notice of motion were that the copies of the by-law published were not true copies of the by-law as passed. That it did not settle a specific sum to be raised annually for the payment of the interest on the debentures and a certain specific sum to be raised annually for the payment of the debt. That the description of the land proposed to be taken was ambiguous and

insufficient. That subsequent to the passing of the by-law the council adopted a plan shewing an intention to reserve a small strip of land not forming a part of the proposed street so as to deprive the applicant of a frontage on and access to the new street. Statement.

That the expenditure of the \$10,000 was for the benefit of a few property owners only.

The motion was argued in Weekly Court on October 8th, 1898, before ROBERTSON, J.

DuVernet and *W. D. Card*, for the motion. The by-law as published omitted the dates when the debentures were to mature, the dates when the interest was payable, and the date when the by-law was to come into operation, and so was not a true copy of the by-law as passed, which it must be, in order to fully inform the electors who are voting on it : sub-secs. 2 and 3 of sec. 338 R. S. O. ch. 223. Even a clerical error, such as 30th for 13th, would invalidate it : *Canada Atlantic R. W. Co. v. Ottawa* (1885), 8 O. R. 183 and 201, 12 A. R. 234, 12 S. C. R. 365. It must be the very one which was submitted : *S. C., per Gwynne, J.*, 12 S. C. R., at p. 375. Omitting the word "act" from "act, default, or neglect," vitiated a by-law : *Spice v. Bacon* (1877), 2 Ex. D. 463 ; *Re Ostrom and The Township of Sidney* (1888), 15 A. R. 372, and cases collected there ; *Dillon on Corporations*, 4th ed., sec. 309. No specific sums were inserted, to be raised for the payment of the interest and the debt under R. S. O. ch. 223, sec. 384, sub-sec. 5, and the recital is not sufficient to cure the defect : *Maxwell's Interpretation of Statutes*, 3rd ed., 440 ; *Hardcastle's Construction of Statutes*, 2nd ed., 47 ; *Re Peck and The Township of Ameliasburg* (1889), 17 O. R. 54 ; *Re Hay and The Town of Listowell* (1897), 28 O. R. 332. The description of the land is ambiguous. The words used are "the Addison property and other properties." That would leave it to the council to say afterwards what "other properties" would be taken, and besides it is too indefinite.

Argument. No plan was made at the time, and it is too late to make it afterwards. The evidence shews the project is not for the public benefit : *Pells v. Boswell* (1885), 8 O. R. 680.

Armour, Q.C., and *J. B. Irwin*, contra. It is not indispensable to state the dates when the debentures become due or the interest is payable : *per* Draper, C.J., in *Re Michie and The City of Toronto* (1863), 11 C. P., at p. 386. Even if an immaterial date was wrongly stated, it would make no difference. If the by-law was passed in good faith and has substantially complied with the statute the Court will exercise a discretion not to quash : *In re Huson and The Township of South Norwich* (1892), 19 A. R. 343. Here the date is fixed by the statute as the day of its passing sec. 384, sub-sec. 2, and where no date is named, the twenty years run from then. Sub-section 3 of sec. 384, shews the latitude given to the council to issue debentures for a part or the whole, and as they do not know how much they require some of the dates must be uncertain and all are not essential : the by-law is good under *Re Michie and The City of Toronto*, *supra*. The preamble which must be inserted in a money by-law (sec. 384, sub-sec. 10), is part of the by-law, and may be consulted to settle an ambiguity : Maxwell, 3rd ed., 59 ; *In re Grant and The City of Toronto* (1863), 12 C. P. 357 ; *The Canada Company v. The County of Middlesex* (1852), 10 U. C. R. 93 ; *Re Farlinger and Village of Morrisburg* (1889), 16 O. R. 722. In *Re Hay and The Township of Listowell* (1897), 28 O. R. 397, the debentures were for electric light works, and should have been made payable within twenty years. *Re Peck and The Township of Ameliasburg* (1889), 17 O. R. 54, does not apply, as the amount was not fixed. The description of the land is sufficient. The words used are : "Through the property known as the Addison property and other properties, so as to continue and extend Ainslie street in a southerly direction between Main street and Hawthorne street." That is sufficient in general terms : sub-sec. 10 (a), sec. 384. If the land can be found upon the ground that is sufficient : *Re Chambers and The Township of Burford* (1894), 25 O. R. 276.

DuVernet, in reply. In *Re Michie and The City of Toronto*, *supra*, the by-law was bad but was not quashed on special grounds, and was not acted on in *In re Nichol and The Township of Alnwick* (1877), 41 U. C. R. 577, *per* Wilson, J., at p. 589. All conditions must be strictly fulfilled: *In re Huson and South Norwich*, *supra*, *per* Hagarty, C.J.O., at p. 350. *Sweeny v. The Corporation of Smith's Falls* (1895), did not follow *Re Farlinger and Morrisburg*, *supra*, *per* Osler, J.A., at p. 441. Argument.

January 27th, 1899. ROBERTSON, J.:—

Several objections were taken and argued before me, each one of which I propose to consider in the order in which they were dealt with by counsel for the applicant, in his argument.

The Municipal Act, sec. 384, sub-sec. 2, requires that every by-law for contracting debts shall name a day in the financial year in which the same is passed when it is to take effect, and if no day is named it shall take effect on the day of the passing thereof.

The date fixed by the by-law as passed by the council is the 8th day of August, 1898, and that was the day on which it was passed.

The by-law as published and submitted to the rate-payers declared that "This by-law shall take effect and come into operation on the day of A.D.

, such date being in the same financial year in which the by-law will be passed."

There is nothing in the by-law or any notice published in connection therewith to shew when the same, if assented to by the electors, would be finally passed by the council.

At present it appears to me that the reference to the date of its taking effect, being in blank, can be treated as surplusage, as it was not necessary to its validity to name the day, the statute supplying the omission by declaring that in that case it shall take effect on the day on which it passed. This applies to that part of the second objec-

Judgment. tion taken, which refers to the by-law as published not
Robertson, J. being an exact copy of the by-law as passed.

It was also contended that the by-law as published left blank the days of payment of the debentures, but stated, within brackets, "being twenty years at furthest from the date on which this by-law takes effect." And also that the by-law as published left blank the date on which the interest should be payable in each year: whereas the by-law as passed declares that the "said debentures shall be payable on the 8th day of August, A.D. 1918 (being twenty years at furthest from the date on which this by-law takes effect)," and that the "interest thereon shall be payable half-yearly on the 8th days of February and August in each year." Therefore the by-law on the face of it, so far as these objections go, is legal, and "the true construction to give to the powers vested in the Court to quash by-laws is, that, unless the by-law be illegal on the face of it, it rests discretionary with the Court, upon extraneous matters, to say whether there is such manifest illegality that it would be unjust that the by-law should stand, or that it had been fraudulently or improperly obtained:" *per Burns, J., in Grierson v. The Council of the County of Ontario* (1852), 9 U. C. R., at p. 632; Draper, C.J., in *Secord and The Corporation of the County of Lincoln* (1864), 24 U. C. R., at p. 147; and Hagarty, C. J., in *In re Lloyd and the Corporation of the Township of Elderslie* (1879), 44 U. C. R., at p. 238.

On comparing the by-law as passed with the proposed by-law as published, it will be found that in the latter the date is left blank when the debentures are to be made payable, and there is also a blank left for the day on which the interest is to be payable; but in the first case it is clear they are to be made payable "twenty years at furthest from the date this by-law takes effect," and such debentures shall be dated as of the day on which this by-law takes effect, and by section 9 it is declared that "this by-law shall take effect and come into operation on the day of _____, A.D. _____, such date being in the same financial year in which the by-law will be passed.

Then, as to the interest, it is not quite so clear. The Judgment. published copy says, "which interest shall be payable yearly, on the _____ in each year." This leaves it in doubt as to whether the interest is to be payable yearly or half-yearly. The by-law as passed makes the interest payable "half-yearly on the 8th days of February and August in each year." Is there any possibility of that working a wrong or injustice on the ratepayers? What difference could it make whether the interest is payable yearly or half-yearly?

In *Spice v. Bacon* (1877), 2 Ex. D. 463, the omission of the word "act" was held to entirely alter the operation of the section of the statute; it did not state the law in the way the first section of the statute (26 & 27 Vict. ch. 41, sec. 3 (Imp.)) states it, and, therefore, it was held that the claim for properties under the statute failed. Here no such result could follow. At present, therefore, I do not feel that I should, in the exercise of that discretion which the Court has, give way to the objection.

But it is said the by-law is defective in that it does not settle a certain specific sum to be raised annually, for the payment of interest during the currency of the debentures therein authorized to be issued or each instalment thereof (as the case may be), and also a certain specific sum to be raised annually for the payment of the debt thereby authorized to be incurred or of each instalment thereof (as the case may be) as required by R. S. O. ch. 223, sec. 384, sub-sec. 5.

The preamble of this by-law in regard to the amounts to be levied each year for interest and sinking fund is as follows: "And whereas it will require the sum of four hundred dollars to be raised annually for the payment of the said interest, and the further sum of three hundred and thirty-five dollars and eighty-one cents to be raised annually as a sinking fund for the payment of the said debt or loan of ten thousand dollars." Then the 5th section of the by-law declares "That for the purpose of forming a fund for payment of the said debentures and

Judgment. interest thereon at the rate aforesaid the specific sum
Robertson, J. hereinbefore recited, namely, the sum of seven hundred and thirty-five dollars and eighty-one cents in each year shall, in addition to all other rates, be assessed, levied, raised and collected in each and every year by a special rate sufficient therefor upon all the ratable property within the limits of the town of Galt during the continuance of the said debentures or any of them."

The only question arising here is whether this section should have specified the two sums required for interest and sinking fund separately instead of the amount of the two combined. The section refers to the recital as "the specific sum hereinbefore recited, namely, the sum of seven hundred and thirty-five dollars and eighty-one cents, in each year."

The 10th sub-section of section 384 requires the by-law in such a case as this to recite (b) "The total amount required by this Act to be raised annually by special rate for paying the new debt and interest." Here the by-law does more than that, because it states the amount required for interest separately, as well as the amount for the sinking fund, and states the total of the two. I do not see, therefore, that there is anything in that objection. A recital is considered an important and necessary part of the by-law, and the recitals and the enacting clauses together make it quite clear what is to be done. The preamble is undoubtedly part of the Act, *per* Pollock, C. B., in *Salkeld v. Johnson* (1848), 2 Ex., at p. 283, and the recitals shew the object and what is required to gain the object for which the Act is passed.

The third ground is that the by-law is defective in that the description of the lands intended to be taken for opening the proposed new street is ambiguous, etc. No plan nor profile shewing elevations, etc.; no definite scheme, etc. The fourth ground refers to the same, and the fifth ground that the opening up of the proposed new street will be for the benefit of a few property owners by diverting the traffic, etc.

In reference to this last or fifth ground, I do not think Judgment. there is sufficient evidence to warrant me in disturbing Robertson, J. the by-law on that ground, but the third and fourth grounds, and particularly the third, creates in my mind a very serious difficulty. The third ground is in these words:—

“That the said by-law is defective in that the description of the lands intended to be taken for the opening the said proposed new street, as set out in the said by-law, is ambiguous; and at the time the said by-law was voted on, the said municipal council had no definite plan of the said proposed new street, nor profile shewing the elevation thereof prepared, nor definite scheme submitted to the ratepayers so that they could intelligently vote thereon.”

The only information I have in regard to the street which is proposed to be opened is contained in the first recital of the by-law, which says: “Whereas it is necessary and expedient to raise the said sum of ten thousand dollars to pay expenses for opening up a street between Main street and Hawthorne street, through the property known as the Addison property, and other properties, so as to continue and extend Ainslie street in a southerly direction between Main street and Hawthorne street.” There is nothing more definite than that. The width of the proposed street is not given, nor is the exact course of the proposed street set forth, nor where it is to intersect Hawthorne street. It does not appear that any by-law was passed expropriating any particular parcel or parcels of land, giving the dimensions thereof, for the purposes of extending Ainslie street, the simple fact being that the by-law in question provides for the issue of debentures to the amount of \$10,000 without any authority to apply, or expend the same. I think, therefore, the by-law is invalid. The council may never have any authority for laying out or expending this sum.

In my judgment the council should have first given notice under section 632 of the Municipal Act of its intention to pass a by-law for opening up and establishing the

Judgment. proposed street, and should have done all things necessary
Robertson, J. under that section before passing such by-law, and then, having passed such a by-law, which should define with reasonable certainty the lands to be expropriated, it appearing by the by-law in question that the proposed street is to pass through private property, etc., the next step would have been to provide by another by-law the ways and means of carrying out the object expressed in the by-law expropriating the lands for the purposes of the proposed extension.

The respondents file affidavits of the mayor and the town engineer in answer to this part of the applicant's objections to the by-law, in which they refer to a map which defines the lands which are proposed to be expropriated, but that appears to be an after-thought, and, besides, these affidavits and plan shew a very irregular strip of land, made up of several parcels taken from several properties. That part of the Addison property proposed to be expropriated is irregular in width, leaving a long strip between the applicant's property and the proposed street of irregular shape, being seven links wide at Main street and extending to about twenty links at a point fifty links from Main street, and from thence to a point forming an acute angle between the applicant's western boundary and the proposed street.

Then on the adjoining property to the south, and marked on this plan as being the "Imperial Hotel property," the land proposed to be taken at the northerly side of that property is thirty-one and a half links wider than what is required for the street, which it is proposed shall be eighty links in width, and from that point at the north-east angle of the hotel property it proceeds along the west side of Hawthorne street for about a chain until it intersects the east limit of the proposed street, leaving a long strip running to a point between Hawthorne street and the proposed street, which is not, apparently, necessary for street purposes, but, in all probability, would be valueless to the owners if left on their hands, the result being

that the eastern side or limit of the proposed street is not Judgment. on the same course or parallel with the western limit, at Robertson, J. several places much wider than others.

The affidavits in reply made by the mayor and town engineer state that the plan indicates what the intention of the council was at the time this by-law was submitted to the ratepayers and when it was finally passed by the council, and it is still their intention to open the proposed street as laid down on this plan. Now, if a by-law for expropriating the land for the street had been passed before the submitting of this by-law, it is difficult to say what the result of the voting might have been.

Then, again, there is nothing to shew what it will cost to make this expropriation, and I think this is material when it is considered that the amount required is to be levied on the ratepayers generally. It may be that it will cost twice or thrice the sum proposed to be levied by this by-law, and by reason of this sum of \$10,000 being raised and expended, the ratepayers may be driven to raise a much larger sum than they would have been willing to agree to if that was known when this by-law was submitted.

It seems to be well established that at the time the by-law was voted on, the council had no settled plan shewing the exact location of the proposed street, nor of the lands to be expropriated, and it is stated by Mr. Allenby, in his affidavit, that he has good reason to believe, and does believe, that a large number of persons voted in favour of the by-law under the impression that that part of Hawthorne street where it runs into Main street was to be closed up and sold to pay part of the expense of opening up the proposed extension in a line with it, and on reference to the plan filed, that appears to me to be a reasonable supposition, but that is no ground for quashing the by-law.

But, taking into consideration other circumstances referred to in the affidavits and papers filed, I am of opinion that there is an absolute necessity in this case of holding the council to the strict requirements of the law, and as I

Judgment. think they have not proceeded regularly, by first exercising
 Robertson, J. the power of expropriation by by-law and then placing
 themselves in a position to expend the amount proposed
 to be raised by the issue of debentures, the by-law should
 be quashed, and I so order, with costs to be paid by the
 municipality to the applicant.

G. A. B.

[DIVISIONAL COURT.]

THOMSON V. CUSHING ET AL.

*Equitable Execution—Interest in Land—Writ of Fi. Fa.—Necessity for
 Amendment—Practice.*

In an action by a judgment creditor for a declaration of the judgment
 debtor's interest in certain lands held by trustees for him under
 the provisions of his mother's will and for equitable execution or
 equitable relief:—

Held, that the plaintiff could not succeed, as his execution was not in the
 sheriff's hands when this action was commenced, and leave to amend
 so as to claim "on behalf of himself and all other creditors" was
 refused, as his action was not a class action.

Decision of MEREDITH, C. J., *ante* p. 123, affirmed.

Statement. THIS was an appeal, by the plaintiff from the judgment
 of MEREDITH, C. J., reported *ante* p. 123, dismissing the
 action. The facts are fully stated in the former report.

The appeal was argued on the 8th and 9th of March,
 1899, before a Divisional Court composed of ARMOUR, C. J.,
 FALCONBRIDGE, and STREET, JJ.

E. D. Armour, Q.C., and *H. J. Martin*, for the appeal.
 It is not necessary that the plaintiff should shew the
 existence of an execution in the sheriff's hands at the time
 of the commencement of the action. The writ of *fi. fa.*
 would be of no practical use as this is not an action to set
 aside a fraudulent conveyance, but for a declaration of the
 plaintiffs' rights and the enforcement of an equitable
 remedy. [*Shepley*, Q.C., for defendants. *Shea v. Denison*
 (1868), 14 Gr. 513, is in point as to that.] *Armour*: If

that decision is law it is a mere question of costs here as Argument.
the plaintiff can bring another action, but he should be granted a declaration in this action as to his rights which is all he really needs. He should not be put to the expense of another action but should be allowed to amend so as to sue on behalf of all creditors which would put him *rectus in curiâ*.

Shepley, Q.C., contra. The amendment sought by the plaintiff will not improve his position. A simple contract creditor suing on behalf of himself and all other creditors cannot maintain an action for equitable execution. The right recognized by cases like *Macdonald v. McCall* (1885), 12 A. R. 593; (1886), 13 S. C. R. 247; and *Longeway v. Mitchell* (1870), 17 Gr. 190, is the right of a member of a class to obtain a declaration on behalf of himself and all other members of the class of the invalidity of a conveyance which a statute has declared void as against the entire class.

[STREET, J.—Why is it necessary for the plaintiff to have an execution, in view of what is said by OSLER, J.A., in *Stuart v. Grough* (1888), 15 A. R. 299, is not his judgment sufficient?]

Shepley—What is said in that case, in *In re Pope* (1886), 17 Q. B. D. 743, and in *Ex p. Evans, In re Watkins* (1879), 13 Ch. D. 252, has no application to an action of this nature, and only applies to an application for the appointment of a receiver in the original action.

A. J. *Boyd*, for the infants.

A. W. *Briggs*, for E. T. Sawtell, a beneficiary.

The Court dismissed the appeal, holding that the plaintiff could not maintain the action as originally constituted, as he had no execution in the sheriff's hands at that time; and that the amendment sought should not be allowed, because a class action could not be maintained for the relief sought.

[DIVISIONAL COURT.]

WRIGHT V. McCABE.

Parent and Child—Obligation to Support—Transfer of Right—Written Agreement—Evidence of Oral Variations.

At common law there is no legal obligation on the part of a parent to maintain his children: the duty is only a moral one. A father, after the death of his wife, agreed in writing with her mother that she should, at her sole expense, have the custody, maintenance and education of his children in consideration of his renouncing his rights thereto and of other considerations:—

Held, that he could transfer his rights as a parent and, in the absence of fraud, evidence of an oral promise by him before the execution of the agreement that he would pay for the maintenance of the children was inadmissible.

Statement. — THIS was an appeal from the judgment of BOYD, C., at the trial.

The action was brought by Elizabeth Wright against her son-in-law Freeborn McCabe for six years' maintenance of his two children, and was tried at Belleville on the 29th day of September, 1898.

Clute, Q.C., P. J. M. Anderson, and G. G. Thrasher, for the plaintiff.

E. G. Porter, for the defendant.

It appeared that the children had lived with the plaintiff and had been clothed and maintained by her since the death of her daughter, who was the wife of the defendant and the mother of the children, pursuant to her request to her husband before she died; and it was proved that the agreement set out in the judgment of MACMAHON, J., had been executed by the plaintiff and defendant the day after her death.

The plaintiff contended that at that time she was in such grief and trouble that she did not understand what she was doing, and sought to give evidence of conversations with the defendant previous to the execution of the agree-

ment in which he had promised to pay for the maintenance of the children while she took charge of and looked after them, and to shew that that was the bargain. Statement.

The learned trial Judge found upon the evidence that at the time of the execution of the agreement there was nothing said or done to mislead the plaintiff and that she knew what she was doing, and he refused to admit the evidence of the previous conversations.

From this judgment the plaintiff appealed and the appeal was argued on the 6th February, 1899, before a Divisional Court composed of MEREDITH, C. J., and MACMAHON, J.

Clute, Q. C., for the appeal. The evidence shews the plaintiff was induced by the defendant's misrepresentations to sign the agreement, and that he promised notwithstanding the agreement he would maintain the children. On the strength of that promise she executed it, and she should be allowed to give evidence of the promise and of other previous conversations to the same effect. In any event the agreement is contrary to public policy. The right to the custody of the children belongs to the father and he cannot divest himself of that right, and he is bound to maintain them. I refer to *Am. and Eng. Enc. of Law*, vol. 17, p. 373; *The Queen v. Edward Smith* (1853), 22 L. J. Q. B. 116; *In re Mary Ellen Edwards* (1873), 42 L. J. Q. B. 99; *Griffith v. Paterson* (1873), 20 Gr. 615; *Simpson on Infants*, 2nd ed. 175, 176; *Schouler's Domestic Relations*, 5th ed., secs. 236, 237.

E. G. Porter, contra. The evidence of what took place previous to the execution of the agreement would not strengthen the plaintiff's case, and defendant admits what took place at the time. The giving up of the defendant's children is a perfectly good consideration for the agreement, and the plaintiff is bound by it to maintain them. Even if the defendant was bound to support them it must be in his own way, and he is willing to take them and do

Argument. so, but he is denied access to them. There must be a contract to enable one who supports another's children to recover: *Seaborne v. Maddy* (1840), 9 C. & P. 497; *Urmston v. Newcoman* (1836), 4 A. & E. 899. [MEREDITH, C. J.—The Court would imply a contract.] Perhaps so in a proper case, such as if the father abandoned the children, but not in such a case as this where he has made ample provision for them by this contract.

Clute, in reply. The contract is void and cannot be acquiesced in or made good.

February 21, 1899. MACMAHON, J.:—

The action was commenced in June, 1898, by which the plaintiff seeks to recover from the defendant (her son-in-law) \$200 a year for the support, maintenance and clothing of his two infant children, from the 23rd May, 1893, who were at that time of the age of four and six years respectively.

The plaintiff, in the fourth paragraph of her statement of claim, sets out the agreement under seal entered into between herself and the defendant, which is as follows:—

“This agreement, made the 23rd day of May, A. D. 1893, between Freeborn McCabe, of the township of Rawdon in the county of Hastings, yeoman, of the first part, and Elizabeth Wright, the wife of Charles Wright, of the same place, yeoman, of the second part, is as follows:—

“Whereas the wife of said Freeborn McCabe, who was a daughter of the said Elizabeth Wright, died Monday, the 22nd day of May, 1893, leaving issue two infant children, aged four and six years respectively; and whereas the said Elizabeth Wright is anxious and willing to adopt the said children and bring them up as her own, the said Freeborn McCabe agrees and binds himself to transfer all his right as a parent of said children to said Elizabeth Wright, and hereby renounces all his rights as the father of them to her, the said Elizabeth Wright. He further agrees to return to the said Elizabeth Wright all the goods and

chattels he received from her at any time as a set out for her daughter, so far as they are now in existence, and the said Elizabeth Wright on her part promises to take care of, rear and educate said children, and to make no demand on said McCabe of any kind to aid in the support of said children. And the parties hereto have this day and year above written, signed and sealed this agreement, and both solemnly promise to observe its provisions to the letter.

(Sgd.) FREEBORN McCABE. [L.S.]

(Sgd.) ELIZABETH WRIGHT. [L.S.]
her mark."

In the fifth paragraph it is alleged that at the time this agreement was executed the plaintiff was mentally unfit to transact business, owing to the grief caused by the recent death of her daughter—the wife of the defendant—and she was unaware of the true nature and effect of the said agreement, and she asks that it be declared null and void.

The defendant's wife died the day prior to the execution of the agreement, and a few days before her death, she several times expressed to her husband, in presence of her mother, the desire that the latter should have the custody of the children. The defendant assented to this, but the plaintiff states that his assent always had annexed to it the condition: "If she (plaintiff) consents to my terms."

According to the plaintiff, the day the agreement was signed the defendant told her that the agreement must be signed that day, otherwise he would give the children to someone else. The plaintiff, accompanied by her son, went to the office of Mr. Parker, a conveyancer in Sterling, where they met the defendant, who, in the plaintiff's presence and hearing, instructed Parker as to the nature of the agreement he desired drawn, upon which the plaintiff requested that the agreement should contain a stipulation on the part of the defendant, that he would return to the plaintiff all the goods and chattels received from her as a "set out" for her daughter on the latter's marriage. Such stipulation forms part of the agreement which was read

Judgment. over before its execution by Mr. Parker, in whom the
MacMahon, plaintiff said she had great confidence.
J.

The plaintiff stated that she understood the agreement when read, except that part of it wherein the defendant renounces his rights as a parent over the children in favour of her (the plaintiff).

The day following the execution of the agreement, the plaintiff went to the defendant's house and obtained possession of the goods and chattels referred to in the agreement, and she stated that the defendant then told her he had laid a trap for her, and that she must be very nice if he gave her anything towards the support of the children. Three weeks after that she procured a copy of the agreement and became fully aware of all its terms.

At the trial, counsel for plaintiff proposed giving the evidence of several witnesses as to conversations between the plaintiff and defendant prior to the execution of the agreement, in which the latter promised to assist in supporting his children; but the learned Chancellor held that such evidence could not, in the absence of fraud, affect the concluded agreement in writing between the parties, and he dismissed the action.

The law on the question is fully and clearly stated in the judgment of the present Chief Justice of the Court of Appeal, in *McNeeley v. McWilliams* (1886), 13 A. R., at p. 330, as follows :—

“The rule as enunciated by Mr. Taylor is, that where parties have deliberately put their mutual engagements into writing in such language as imports a legal obligation, it is only reasonable to presume that they have introduced into the written instrument every material term and circumstance.

“The only safe criterion of the completeness of a written contract as a full expression of the terms of a party's agreement is the contract itself.

“The question is one for the Court, for it relates to the admission or rejection of evidence.

“‘If the instrument,’ says Erle, C.J., ‘shews that it was

intended to contain the whole bargain between the parties, no extrinsic evidence can be received to introduce a term which does not appear there.' Where the parties have, by a written paper purporting to be complete on its face, undertaken to define their agreement, parol evidence ought not to be admitted to add a single stipulation or vary the legal effect of those contained in it."

Judgment.
MacMahon,
J.

In *Mercantile Bank of Sidney v. Taylor* [1893], A. C. 317, in a suit against one of five joint and several sureties to recover the amount guaranteed, it appeared that the plaintiff had, without the defendant's knowledge and consent, released another of the sureties from all debts due by him to the bank at this date. It was held that the plaintiff could not recover and that the legal effect of the release could not be modified by evidence of verbal negotiations prior to the release, for the purpose of shewing an agreement to reserve rights against the sureties.

Dealing with the very point raised in the present case, Lord Watson, in delivering the judgment of the House of Lords, said at p. 321: "It appears to their Lordships that no foundation was laid at the trial for the admission of any such evidence as the appellants proposed to adduce. It had been proved that the whole terms of the agreement under which Griffin became entitled to his release were embodied in the bank's letter of the 5th April, 1889, which he accepted without reservation or qualification. On that assumption, it is plain that the previous verbal communications which had passed between him and the bank were completely superseded, and could not be legitimately referred to, either for the purpose of adding a term to their written agreement, or of altering its ordinary legal construction. But that is what the appellants proposed to do without attempting to impeach the testimony which established that their letter of the 5th April, 1889, accepted by Griffin, constituted the sole contract between them."

The defendant, for his own protection, insisted on having the bargain he intended being bound by reduced to writing; and there is the evidence of the plaintiff herself, that

Judgment. the defendant, during the various discussions relating to
MacMahon, the custody of his children, stated that before consenting
J. to part with them his terms must be agreed to by her.
The effect of admitting the evidence referred to would be
to add a new term to the contract.

So long as there was no evidence of fraud, it matters not what the nature of the conversations were prior to the concluded agreement being entered into. That, according to the authorities, must govern.

At common law, according to the cases, the obligation on the part of a parent to maintain his children is only a moral one. And Cockburn, C.J., in *Bazeley v. Forder* (1868), L. R. 3 Q. B., at p. 565, said: "It is now well established that, except under the operation of the poor law, there is no legal obligation on the part of the father to maintain his child, unless, indeed, the neglect to do so should bring the case within the criminal law. Civilly there is no such obligation." To the like effect is the judgment of Parke, B., in *Mortimore v. Wright* (1840), 6 M. & W. 482; Eversley's Law of the Domestic Relations, 2nd ed., p. 516.

One may feel that in entering into the agreement by which the defendant was casting upon another the responsibility for the support of his children, he was not manifesting the affection which a parent should have for his offspring. But these are matters which we cannot here consider, any more than we can deal with merely moral obligations.

The plaintiff, after full knowledge of the responsibility attached to her by the contract, continued to act upon it for five years, when she could have released herself from the obligation by the return of the children to the defendant. And it would be a fraud upon the defendant if a liability could now be fastened upon him for a claim against which he intended to protect himself, and had protected himself by the contract he had entered into.

If the defendant could be made liable for the support of the children during the past five years, he could also be

made liable for their future support, although the plaintiff is unwilling to give up the possession of the children to the father.

Judgment.
MacMahon,
J.

The evidence proposed to be given by the plaintiff was not admissible, and therefore its rejection can form no ground for granting a new trial.

The motion must be dismissed without costs.

MEREDITH, C. J. :—

I agree in the result at which my brother MacMahon has arrived, and have a word only to add to what he has said.

If, as the plaintiff contends, the agreement between her and the defendant is not binding on her because of its being contrary to public policy and therefore void, or because of its nature and effect not having been understood by her, it is nevertheless on the parol evidence including that of the witnesses whose affidavits have been filed on the motion, manifest that the defendant refused to bind himself to pay for the maintenance of the children, and that the plaintiff received them from him fully understanding this.

It may be that the defendant gave as his reason for refusing to be bound, that he did not wish that his farm should ever be sold to pay for the maintenance of his children, but whatever his reason may have been stated to be, the fact remains that he parted with the custody of the children, and the plaintiff, as she admits, received them upon the distinct understanding that the defendant was to be under no legal liability to the plaintiff for their maintenance.

I have no doubt that the defendant led her to believe that though under no legal obligation there was a moral obligation resting upon him to provide for his children's maintenance which he intended to fulfil, but the breach of that moral obligation can give no right to the plaintiff to recover in this action.

[DIVISIONAL COURT.]

McDONALD v. GAUNT.

Bill of Sale—Date of Actual Execution—Interpleader Issue—Writ of Execution—Invalidity—R. S. O. ch. 148.

The date in a bill of sale is immaterial if it is registered after its actual execution within the time required by R. S. O. ch. 148, "The Bills of Sale and Chattel Mortgage Act."

On a *bonâ fide* sale of goods, it is not necessary that the bill of sale shall be completed by execution of the instrument in any particular time after the actual sale.

Statement. THIS was an appeal from the judgment of the county court Judge of the county of Bruce in an interpleader issue in which the validity of a bill of sale came into question; the particulars of which, and the circumstances under which it was executed, are stated in the judgment of FERGUSON, J.

The appeal was argued on February 1st, 1899, before BOYD, C., and FERGUSON, J.

C. J. Holman, for the plaintiff appellant, contended that the discrepancy in the date of the bill of sale from that of its actual execution was not fatal: *McLean v. Pinkerton* (1882), 7 A. R. 490; Pingrey on the Law of Chattel Mortgages, sec. 140; and so as to a will: Taylor on Evidence, 9th ed., sec. 1150; *Martin v. Sampson* (1896), 24 A. R. 1; *Mayburry v. Brien* (1841), 15 Peters 21; nor was the delay in its execution: *Ex parte Allam, In re Munday* (1884), 14 Q. B. D. 43; *Pettigrew v. Thomas* (1885), 12 A. R., at p. 584; *Smith v. Fair* (1885), 11 A. R., at p. 758; *Parkes v. St. George* (1884), 10 A. R. 496; that it was for the jury to say whether the whole transaction was *bonâ fide* or not, and they decided that it was; and that the bill of sale being valid, there was no need to shew change of possession, which, however, was sufficient under the cases. As to the presence of the defendant at the sale, he cited *Robertson v. Wrenn* (1895), 10 Man. 378; *Furlong v. Reid* (1886), 12 O. R. 607; *Belanger v. Menard* (1896), 27 O. R. 209.

Morrison, for the defendant, contended that the wrong
date was one element in a concocted scheme to fraudulently
defeat the execution ; that no value had really been given ;
and that the bill of sale should be declared void : *Barron*
on *Chattel Mortgages*, 2nd ed., pp. 75, 397 ; *Ormsby v.*
Jarvis (1892), 22 O. R. 11 ; *Stoddart v. Wilson* (1888), 16
O. R. 17, 22 ; R. S. O. ch. 147, sec. 2 ; *ib.* ch. 148, secs.
6, 39.

Argument.

February 8th, 1899. FERGUSON, J.:—

This is an interpleader issue tried before the Judge of the county court of the county of Bruce, with a jury. The interpleader was at the instance of the sheriff of the county, who seized the goods under a writ of execution at the suit of the defendants against the father of the plaintiff, and the question for trial was whether the property was on the 7th day of December, 1897, the property of the plaintiff as against the defendants.

The plaintiff and his father lived together upon a farm in the township of Kinloss, which, as appears by the evidence of the plaintiff, had been mortgaged by the father to nearly or about its full value. This farm was, in the autumn of 1896, conveyed by the father to the plaintiff, subject to the encumbrance upon it. The father had also a chattel mortgage existing upon his personal property upon the farm. In the month of March, 1897, the father, with the assent of these chattel mortgagees, had an auction sale of his chattel property, which was a credit sale, the purchasers to give their notes for the amount of their respective purchases, which notes were to be payable at nine months from the day of the sale, the intention being that the proceeds of the sale should be turned over to the chattel mortgagees, so far as might be required in satisfaction of their mortgage, which was done, their mortgage being so paid except as to the sum of \$56, which, as the plaintiff in his evidence says, was afterwards paid by him. This sale was held on the 16th day of March, and the

Judgment. plaintiff became a purchaser thereof of property amounting to \$220. There was not, at the time, any bill of sale of the property purchased by the plaintiff executed to him, but ten days afterwards and on the 26th of March, 1897, a bill of sale was executed and duly filed or registered on the same day. This bears date the 16th day of March, but the affidavit of the subscribing witness states the true date of its execution (the 26th of March). The seizure of the goods by the sheriff did not take place till December 7th, 1897. The learned Judge appears from his charge to the jury to have been of the opinion that this bill of sale is invalid, for the reason that it was not executed immediately after the sale and then duly registered within the prescribed time, and the case was left to the jury, not upon specific questions, but with an elaborate charge embracing the subjects of immediate delivery and actual and continued change of possession of the property as well as the statute of Elizabeth and our own statute respecting assignments and preferences by insolvent persons, including, of course, the *bona fides* or not of the transaction, the plaintiff having stated in giving his evidence that at the time of the sale to him his father was unable to pay his debts in full: The jury found a general verdict for the plaintiff. The learned Judge, upon a motion against this verdict, professedly acting under the provisions of Rule 615, set aside the verdict and ordered a judgment to be entered in favour of the defendants, with costs, and from this judgment is the appeal here.

I think the learned Judge was in error in considering the bill of sale bad for the reason given by him and stated above, and, so far as I am able to see, this bill of sale is not bad by reason of any informalities and had the effect of casting the burden upon the defendants. See the cases *Ex parte Allam*, *In re Munday* (1884), 14 Q. B. D. 43; *Furlong v. Reid* (1886), 12 O. R. 607; *Belanger v. Menard* (1896), 27 O. R. 209; *Smith v. Fair* (1885), 11 A. R. 755; *Pettigrew v. Thomas* (1885), 12 A. R., at p. 584; where the remarks of Mr. Justice Patterson go to shew also that where there

is a fresh bill of sale that is good the question as to the Judgment. change of possession of the goods need neither be sub- Ferguson, J. mitted to a jury nor decided at all.

The plaintiff seems to have purchased the goods at the sale just as other purchasers did. They were not, nor is it alleged that they were, purchased at an undervalue. The bill of sale answers, as I think, the requirements of the statute. The jury by their verdict affirmed the *bona fides* of the transaction and negatived any intent to defeat, hinder, delay or prejudice creditors (and these were proper subjects for the consideration of a jury).

The bill of sale having been proved the *onus probandi* was upon the defendants as before stated. The question is not whether the Judge or a Court would have arrived at the same conclusion. The case appears to have been submitted under a charge that appears to me against the plaintiff's contention, and they found as they did. I am not able to perceive any proper grounds for disturbing the verdict. If it is assumed to embrace a finding that there was an immediate delivery and an actual and continued change of possession of the chattels, this is, in the circumstances, wholly immaterial.

On the whole case I am of the opinion that the appeal should be allowed, and the verdict of the jury restored with costs.

BOYD, C. :—

There is no ground to impeach the bill of sale because of nonconformity with the provisions of the Bills of Sale and Chattel Mortgage Act, R. S. O. ch. 148. Though the bill of sale is dated 16th, it was not in fact executed till the 26th of March, and was duly registered within five days from that time, and before any execution was in the sheriff's hands. The nominal date is immaterial—the instrument takes effect from and after the date and time of execution (R. S. O. ch. 148, sec. 4). There is no requirement that the bill of sale shall be completed by execution of the instrument within

Judgment. so many days of the actual sale, and there is no ground for
Boyd, C. saying that the delay in the preparation of the instrument for ten days is fatal to its validity under the statute. The defendant besides was present at the auction sale and knew of this purchase.

Upon the other branch of the appeal I agree with the result reached by my brother Ferguson. The questions were such as were proper for the determination of a jury; they were tried by a jury and there was such evidence given as could not be withdrawn from a jury. Unless we can say that the matter in dispute ought not to have gone to the jury, it is difficult to say that the finding of the jury thereon should afterwards be reversed by the Judge. The jury have in effect negatived fraud and fraudulent intent on the part of the purchaser, and though they might, on the evidence, have come to a different conclusion, yet their finding either way must be regarded as ultimate.

A. H. F. L.

[DIVISIONAL COURT.]

REGINA V. LEVY.

Municipal Corporations—Police Commissioners—Second-hand Stores and Junk Shops—By-law Prohibiting Dealing with Minors—R. S. O. ch. 223, sec. 484.

R. S. O. (1887), ch. 184, sec. 436 (R. S. O. ch. 223, sec. 484), which provides that "The Board of Commissioners of Police shall in cities license and regulate second-hand stores and junk stores," does not authorize a by-law to the effect that "no keeper of a second-hand store and junk store shall receive, purchase or exchange any goods, articles or things from any person who appears to be under the age of eighteen years." Such a by-law is bad as partial and unequal in its operation as between different classes, and involving oppressive or gratuitous interference with the rights of those subject to it without reasonable justification.

THIS was an application to quash the conviction of the Statement.
keeper of a second-hand shop in the city of Guelph for purchasing a quantity of old iron from boys under eighteen years of age, contrary to a by-law of the police commissioners.

The motion was argued on February 3rd, 1899, before BOYD, C., and FERGUSON, J.

DuVernet, for the motion, contended that the by-law in question was not warranted under the section of the Municipal Act as to licensing and regulating second-hand shops: R. S. O. ch. 223, sec. 484, sub-sec. 1; that where power to prohibit was intended to be given, it was done in express terms: *ibid*, sub-sec. 5; that all the Acts limiting the power to deal with minors, did so in express words: R. S. O. ch. 245, sec. 78; R. S. O. ch. 247; R. S. O. ch. 261, secs. 1, 2, 3; *Bannan v. City of Toronto* (1892), 22 O. R. 274; *Merritt v. City of Toronto* (1895), 22 A. R. 205; *Virgo v. The City of Toronto* (1893), 22 S. C. R. 447; [1896] A. C. 88; *Attorney-General for Ontario v. Attorney-General for the Dominion*, [1896] A. C., at p. 363. The conviction should be quashed with costs: *Regina v.*

Argument. *Hart* (1891), 20 O. R., at p. 616; *Regina v. Westlake* (1892), 21 O. R. 619.

Hugh Guthrie, for the prosecutor, contended that the provision in the by-law was a salutary one, the object being to prevent youths stealing scrap iron, and trying to raise a few cents on it at junk shops: *Ross v. Corporation of York and Peel* (1864), 14 C. P. 171; that there was no question of discrimination here as in the *Virgo* case, the matter being purely one of good morals: *Slattery v. Naylor* (1888), 13 App. Cas. 446.

DuVernet, in reply, referred to *Merritt v. City of Toronto* (1895), 22 A. R., at p. 209, as distinguishing the *Slattery* case, and to *In re Barclay and Municipality of Darlington* (1854), 12 U. C. R. 86.

February 8th, 1899. BOYD, C. :—

The motion is to quash a conviction under a by-law of the police commissioners of Guelph, for that the defendant being the keeper of a second-hand store did purchase old iron and bones from three boys appearing at the time to be under eighteen years of age. The provisions of the by-law to this effect purport to be pursuant to the power given to the police commissioners by the Municipal Act ch. 223, sec. 484, by which they were empowered to "license and regulate second-hand shops and junk stores." Junk store appears to be an American equivalent for second-hand shop—a place where odds and ends are purchased and sold: *American and English Encyclopædia of Law*, *sub voce*.

That is the whole power given to license and regulate and the objection is that the enactment of the by-law transcends the statutory delegation of power.

The by-law is justified in the interests of good government, so as to stop pilfering of trifles by youths under eighteen, by shutting up a ready means of disposing of what is unlawfully gained through the agency of the junk shops. However praiseworthy the motive may be, that

will not support a regulation which transcends the power conferred by the statute, and which is on its face unreasonably restrictive. The power given by the Municipal Act is to regulate the junk shop, not to prescribe the class of people who shall deal thereat: see *In re Barclay and The Municipality of Darlington* (1854), 12 U. C. R., at pp. 95-97; *Macdonald v. Lochrane* (1887), 3 Times L. R. 464. The assumption is that infants under eighteen are predisposed to dishonesty, and that their natural tendency shall be checked by forbidding junk shop men to bargain with them. But, as said by Williams, J., in *Elwood v. Bullock* (1844), 6 Q. B., at p. 401: "This by-law might be used to prohibit, not only things having evil consequences, described in the plea, but things of an indifferent or even salutary kind." Thus the infant might be the messenger of a sick parent to dispose of something to procure food or medicine, or the infant might be an orphan working for a living and seeking to sell or exchange something he had honestly earned; or it might be the industrious boy who collects bones and cannot sell them at the junk shop. The presumption of the law is in favour of honesty and just dealing, but to support this term of the by-law the presumption must be in favour of dishonesty. In point of substance the by-law is just as objectionable as if this inhibition was against all dealing with coloured people or married women. In brief, the by-law is open to the objections pointed out by Lord Russell in *Krun v. Tolman*, [1898] 2 Q. B., at p. 99, as being partial and unequal in operation as between different classes, and inviting oppressive or gratuitous interference with the rights of those subject to the by-law without reasonable justification.

It is not a case for costs, although we quash the conviction. The by-law was made in good faith, and a license under it was accepted by the defendant, which, though it may not estop him from moving to quash, should weigh with us in awarding or withholding costs.

Judgment.

Boyd, C.

Judgment. FERGUSON, J. :—

Ferguson, J.

The motion is to quash a conviction of the defendant by the police magistrate of the city of Guelph on the 27th day of April, 1898. The alleged offence, as stated in the conviction was: For that the defendant within the space of six months last past, to wit, on the 6th day of April, 1898, at the city of Guelph, in the county of Wellington, being the keeper of a second-hand store in Gordon street, in the said city, did purchase a quantity of old iron from three boys, appearing at the time to be under the age of eighteen years respectively, contrary to a by-law of the police commissioners of the city of Guelph, passed on the 1st day of February, 1891, to license and regulate second-hand stores and junk shops.

The by-law on its face professes to have been passed under the power and authority given by sec. 436 of ch. 184, R. S. O. (1887), which appears to be the same in this respect as sec. 484 of R. S. O. ch. 223.

The power given or delegated is stated in these words: "The board of commissioners of police shall in cities license and regulate second-hand stores and junk stores." In the later Act the words "or shops" are added, but this seems not a material difference.

It is not contended that the defendant was not duly licensed under the provisions of the by-law, and it is here assumed that he had a proper license as a keeper of a second-hand store.

The 9th clause of the by-law is: "No keeper of a second-hand store or junk store shall receive, purchase or exchange any goods, articles or things from any person who appears to be under the age of eighteen years, or from any person under the influence of liquor, nor receive any goods, articles or thing upon any fast day or thanksgiving day duly appointed by proclamation, nor on any Sunday, nor on any other day before 7 a.m., nor after 7 p.m."

The objection urged against the by-law is that it imposes a total restriction against receiving, purchasing, etc.,

any goods or articles from any person who appears to be under the age of eighteen years, the contention being that the restriction is not authorized by the power given to "regulate;" that the restriction is not a regulation, or any part of a regulation, and that the by-law is in this regard *ultra vires* and bad, and that this being so, the conviction is bad. Judgment.
Ferguson, J.

I think the principle on which this matter is to be decided is found in the judgment in the case *In re Barclay and The Municipality of Darlington* (1854), 12 U. C. R., at p. 95. There the power was, as here, a power to "regulate." The rule or regulation in the by-law is stated by the learned Chief Justice. It is, that no inn keeper shall sell intoxicating drink to any apprentice or minor without the permission of his legal protector, nor shall he sell to any habitual drunkard after being forbidden to do so by any relative or friend of such drunkard. The Chief Justice said (at p. 95), in delivering the judgment of the Court: "We think the municipal council have taken an incorrect view of their powers in selecting any particular class as persons who shall be unable to obtain wine or spirits or beer at an inn, under any circumstances." This view is, I think, apposite here, and having examined all the authorities referred to in the argument without finding anything opposed to it, but much appearing to me to be looking in the same direction, I think the view should be adopted and applied, and this being done, the part of this by-law called in question here must be held to be bad as being beyond the power delegated, and in excess thereof.

The result then is that the conviction of the defendant must be held to be bad and quashed. I agree in the disposition of the Chancellor as to the costs.

A. H. F. L.

[DIVISIONAL COURT.]

SILVERTHORN V. GLAZEBROOK.

Mortgage—Consolidation—Derivative Mortgage—Redemption.

The plaintiff as mortgagee of land of which the defendant was the owner of the equity of redemption, was also derivative mortgagee from the latter of other lands :—

Held, that the plaintiff was entitled to consolidate his claims in an action of foreclosure :—

Held, also, that the plaintiff might foreclose the original mortgage, without making the original mortgagor a party.

Statement.

THIS was a motion by way of appeal to the Divisional Court from the judgment of FALCONBRIDGE, J., of July 13th, 1897, upon motion for judgment in this action which was for foreclosure or redemption. It appeared that under a mortgage dated August 20th, 1892, from Margaret Hillman and George L. Hillman, the plaintiff was mortgagee of certain property on Kensington avenue, in the city of Toronto. At the time the action was brought the defendant owned the equity of redemption in the lands, and on January 19th, 1894, when he became owner, he covenanted with the plaintiff to pay the principal money and interest secured by the mortgage which was overdue and unpaid. It further appeared that the defendant being mortgagee of certain other lands in Toronto under a mortgage dated July 4th, 1893, from one John Long to him, to secure \$8,000 and interest, on October 21st, 1893, made a sub-mortgage of such mortgage to the plaintiff to secure a sum of three thousand dollars with interest, which money was also overdue and unpaid. The plaintiff claimed that as an equity of redemption in the Long mortgage and also in the lands in Kensington avenue were both vested in the defendant, he (the plaintiff) was entitled to consolidate the two securities held by him as above mentioned and the mortgage debts secured thereby, and to require that he should not be redeemed as to the one security without payment by the defendant of the whole

indebtedness due upon both, and he claimed payment accordingly, and that in default the equity of redemption in the Kensington avenue lands and in the Long mortgage should be foreclosed, and a declaration that he was entitled to consolidate his securities and claims as against the defendant. Statement.

By his judgment of July 13th, 1897, FALCONBRIDGE, J., directed foreclosure with separate accounts of the amount due on the two securities of the plaintiff, and declined to make any declaration that the plaintiff was entitled to consolidate.

The present motion was made on January 31st, 1899, before a Divisional Court consisting of BOYD, C., and MOSS, J. A.

J. B. O'Brian, for the plaintiff, contended that there was here one borrower and one lender and that the fact that there was an equity outstanding in the Long mortgage did not debar the plaintiff of his right to consolidation: *Coote on Mortgages*, 5th ed., Vol. 2, p. 909; *Cracknall v. Janson* (1879), 11 Ch. D. 1. The plaintiff was not seeking to foreclose Long.

G. G. Mills, for the defendant, contended that the defendant was not and never was the owner of both estates, Long being the owner of one of them and that therefore the plaintiff was not entitled to consolidation. Moreover, Long was a necessary party if consolidation was sought: *Mills v. Jennings* (1880), 13 Ch. D. 639; *Ireson v. Denn* (1796), 2 Cox 425.

O'Brian, in reply, referred to *Pledge v. White*, [1896] A. C. 187, 44 W. R. 589.

February 2nd, 1899. BOYD, C.:—

The plaintiff seeks to consolidate securities as against the defendant which are held by him first as legal mortgagee of land of which defendant is owner of the

Judgment. right of redemption, and next as derivative mortgagee
Boyd, C. under a security mortgaged by the defendant to him.

The suit is rightly constituted for the sub-mortgagee may foreclose the original mortgagee without making the existing mortgagor a party: Seton on Decrees, 5th ed., Vol. ii., p. 1733, approved by Robbins' Law of Mortgage, Vol. i., p. 721. Indeed, in this case, it does not appear that there was any default on the original mortgage which by its terms was not to fall due till July, 1898. But in the other securities default had been made and the action was begun in April, 1897.

The rule as to consolidation applies to securities of different natures, *e.g.*, an assignment of policies and mortgages of freeholds and leaseholds. Coote on Mortgages, 5th ed., Vol. ii., p. 909, and the language used by Jessel, M.R., in the case relied on of *Cracknall v. Janson* (1879), 11 Ch. D., at pp. 17, 18, is wide enough to cover such a case as the present.

I think that the equitable reason applies in this case that the defendant being in default as to both cannot be allowed as against the plaintiff to redeem the one security without the other, and that the judgment should be for consolidation. Costs of appeal and below to the plaintiff in the cause.

Moss, J. A.:—

I agree. It has been said that the doctrine of consolidation of mortgages should not be extended. But as pointed out by Lord Davey in *Pledge v. White*, [1896] A. C., at p. 198, notwithstanding the limitations placed upon it in some directions it is still applicable where at the date when redemption is sought all the mortgages are united in one hand and redeemable by the same person.

This is the state of matters in this case, and unless the fact that one of the securities held by the plaintiff is a derivative mortgage makes a difference, the plaintiff is entitled to apply the doctrine in his foreclosure action.

There does not appear to be any solid ground of distinction between such a security and many of those where the rule has been enforced. Judgment.
Moss, J.A.

The judgment should be as indicated by the learned Chancellor.

A. H. F. L.

[DIVISIONAL COURT.]

RYAN V. WILLOUGHBY.

Contract—Impossibility of Performance by Act of Party—Municipal Corporations—Member Interested in Sub-contract—Duty to Resign Office—Refusal to Carry Out Sub-contract—Liability.

The defendant, who was a member of a municipal corporation, and who would have been disqualified, under sec. 80 of the Municipal Act, R. S. O. ch. 223, from entering into or being interested in a contract with the corporation, entered into a sub-contract to do the brick and mason work of a town and fire hall which was being erected for the corporation under a contract which contained a provision that the contractor should not sub-let the work or any part thereof without the consent in writing of the architect and corporation. The defendant agreed to resign his seat—though this formed no part of his written contract—which he afterwards refused to do on the ground that the corporation declined to accept him as a sub-contractor, and a resolution was passed by the corporation to that effect, whereupon the defendant refused to perform the contract :—

Held, that the defendant by his omission to resign had not done all in his power to enable him to perform the contract, and was precluded thereby from setting up the resolution of the council as an answer to his non-performance, and was liable for the damages sustained by the plaintiff.

THIS was an action tried before FERGUSON, J., without Statement.
a jury at Perth, on the 9th of December, 1898.

The circumstances of the case were as follows:—On the 24th of October, 1895, the plaintiff entered into a contract with the corporation of the town of Carleton Place, in the county of Lanark, for the erection by him for the corporation of a town and fire hall according to certain plans and specifications.

By the terms of the contract he was to furnish all the materials and do all the work to the satisfaction of George W. King, the architect appointed by the town corporation.

Statement.

The contract contained a provision in the following words: "The contractor shall not sublet the works or any part thereof without the consent in writing of the architect and corporation."

On the 1st of May, 1896, the defendant, who was also a contractor, entered into an agreement under seal with the plaintiff, reciting the contract between the plaintiff and the corporation, and agreeing to execute and perform "all the work required to be done in the trades and under the head of mason and brick work in the erection and completion of the town and fire hall * * agreeably to the plans, drawings and specifications prepared for the said works by George W. King, architect, to the satisfaction, and under the direction and supervision of George W. King, the architect."

At the time the defendant entered into this contract he was one of the town councillors of the town of Carleton Place, and believing that he was disqualified from holding that position and performing the work stipulated for in his contract with the plaintiff he promised the plaintiff that he would resign his position in the council, but no stipulation to that effect was inserted in the contract.

Shortly after the defendant had signed the contract he had a disagreement with the plaintiff over the terms of another contract between them, and learning afterwards that the plaintiff had no power to sublet the contract or any part of it without the leave of the council, he said to the councillor who gave him this information, that he would stay in the council. He was present at a meeting of the council on the 11th of May, 1896, at which the question of the consent of the council to the subletting to him was brought up, but sat in another part of the room with the spectators while it was being disposed of.

The following resolution was then passed by the council: "That this council declines to accept Mr. Willoughby as a sub-contractor under Mr. Ryan for the mason and brick work of the town and fire hall, as we believe that his many years of practical experience will be of great

benefit to the building committee in seeing that this contract is faithfully executed, and that he being a member of this council is disqualified to take such contract, and that the clerk is hereby authorized to notify Mr. Ryan." Statement.

This resolution was forwarded by the clerk to the plaintiff, who notified the defendant to proceed with the work. This the defendant declined to do, unless the plaintiff would procure the consent of the architect and corporation to the subletting of the contract. The plaintiff then, after notifying the defendant that he would proceed to put men on to do the work contracted for by the defendant and charge him with the extra expense, proceeded to do so, and this action was brought to recover the extra cost incurred by him.

The learned Judge held the defendant liable, and gave judgment for the plaintiff with costs to the trial inclusive, and directed a reference as to damages, reserving further directions and subsequent costs.

From this judgment the defendant appealed to the Divisional Court.

On February 14th, 1899, before a Divisional Court composed of ARMOUR, C. J., FALCONBRIDGE, and STREET, JJ., Watson, Q. C., supported the appeal. The original contract between the corporation and Ryan provided that there should be no subletting of the contract without the consent of the corporation. The sub-contract incorporates the original contract within it and made its terms part of it. It is therefore a condition precedent to the entering into of the sub-contract that the consent of the corporation should be first obtained, and it was the duty of the plaintiff and not of the defendant to obtain such consent. The plaintiff also knew of the prohibition under the Municipal Act against a member of the council entering into a contract in which the corporation were interested R. S. O. ch. 223, sec. 80, 58 Vict. ch. 42, sec. 2 (O.): *Le Feuvre v. Lankester* (1854), 3 E. & B. 530. It is no answer that the refusal of the corporation was procured by the defen-

Argument. dant: *Wythe v. Manufacturers Accident Ins. Co.* (1894), 26 O. R. 153; *McNamara v. Skain* (1892), 23 O. R. 103, but in any event there is no evidence that the refusal was so procured. The evidence shews that the council acted on their own opinion. The defendant was told by the members of the council that whether he resigned or not, the council would not consent to the sub-contract. This was a personal contract made with the plaintiff, the corporation relying on him to carry it on, and, in order to enforce his carrying it on, this provision was entered into: *British Waggon Co. v. Lea* (1880), 5 Q. B. D. 149.

Shepley, Q. C., contra. The consent of the corporation was not a condition precedent to the making of the contract. The contract was a good contract between the plaintiff and defendant: *Davis v. Nisbett* (1861), 10 C.B.N. S. 752. The crux of the case is not whether the defendant asked the council to refuse their consent, but whether he acted in such a manner as to induce the corporation to withhold their consent, for example, by not resigning. The defendant should have at first resigned so as to aid the council in dealing with the matter, but by refusing to resign he thus by his own act prevented the council from giving its consent: *Mackay v. Dick* (1881), 6 App. Cas. 251. The prohibition does not come within the terms of the sub-contract. The prohibition was not to assign the works or any part thereof. It never was intended that the plaintiff should personally do the whole work himself. He could employ others to do certain parts of it, and this was all he was doing when he let this sub-contract, and employed the defendant to do the mason and brick work. All the corporation desired was that it should have the plaintiff's personal supervision, and that he should be responsible. The whole trouble was that the defendant finding he had to furnish a more expensive kind of brick than he thought took means to prevent the contract from being carried out, and judgment was therefore properly entered in favour of the plaintiff.

Watson, in reply. The cases referred to on the other

side do not apply, as there there were covenants to do something. Here, however, there was no covenant or agreement to resign, but on the other hand the consent was to be procured by the plaintiff. It would have been useless for the defendant to resign when he was told that whether he resigned or not the council would refuse to allow him to take the contract. In any event whether or not the consent was a condition precedent to entering into the contract, it was certainly a condition precedent to be performed before the work could be commenced. In addition to the consent being required by the contract, it is also required by the specifications. Argument.

February 23rd, 1899. The judgment of the Court was delivered by

STREET, J. :—

At the time the contracts in question were made "the Consolidated Municipal Act 1892" was in force. It is provided by the 77th section of that Act (now the 80th section of the Municipal Act ch. 223 R. S. O.), that "no person having by himself or his partner an interest in any contract with or on behalf of the corporation * * shall be qualified to be a member of the council of any municipal corporation."

The defendant, when he entered into his contract with the plaintiff, was aware of this prohibition, and believing that it stood in the way of his obtaining a sub-contract for the performance of the work he wished to undertake promised the plaintiff that if the sub-contract were given him he would resign his seat in the council in order that the obstacle might be removed. The council being evidently of the same belief refused to consent to the sub-contract, giving as one of their reasons that the defendant "being a member of this council is disqualified to take such contract."

The general rule as to the duties of parties under such cir-

Judgment.
Street, J.

cumstances is stated by Lord Blackburn in *Mackay v. Dick* (1881), 6 App. Cas. 251, at p. 263, as follows :—"Where in a written contract it appears that both parties have agreed that something shall be done, which cannot effectually be done unless both concur in doing it, the construction of the contract is that each agrees to do all that is necessary to be done on his part for the carrying out of that thing, though there may be no express words to that effect."

In my opinion the view taken by the defendant and by the council that he could not remain a member of their body if he were permitted to take the contract in question was the correct one. He had an interest in the contract when he agreed with the contractor to be substituted for him as between themselves in all the liabilities which the contractor had assumed towards the corporation, although the sum which he was to receive was not to be paid him directly by the corporation and was not necessarily that which the corporation was to pay for that part of the work. He was to be entitled to no pay for his work unless the person appointed by the corporation for the purpose should certify that it was done in accordance with the precise terms of the contract. The objects of the statute must be looked at, and the evils it was intended to guard against. These are plain enough: the members of municipal councils were not to be allowed to place themselves in a position where their duty and their interest might conflict; they were not to be allowed to pass either their own work or materials as sufficient under contracts with the corporation. The case of their supplying materials either directly or indirectly is covered specially by a part of the section to which I have referred; but no argument in favour of their right to do work under corporation contracts can be deduced from the special provision with regard to materials, there being language sufficient to cover both, and no indication of either a reason for putting, or an intention to put, work in a different position.

If the defendant could accept this contract and remain

in the council then he is practically entitled to sit in judgment upon the work he has done, and having adjudged it to be well done could vote that it be accepted and paid for. The interposition of an architect appointed by the council can make no difference, because his decisions against the contractor could at any time be waived by a majority of the council.

The scope and intent of the statute being plain it is to receive such large and liberal construction as will best ensure the attainment of its object: The Interpretation Act R. S. O. ch. 1, sec. 41: "Whenever the case is clearly within the mischief, the words must be read so as to cover the case if by any reasonable construction they can be read so as to cover it, though the words may point more exactly to another case; this must be done rather than make such a case a *casus omissus* under the statute." *Scott v. Legg* (1876), 2 Ex. D. 39-42.

In my opinion then the defendant had an interest in this contract within the meaning of the Act because he was to do a part of the work required by the contract and was not entitled to be paid for it until it was passed by the architect appointed by the corporation.

The case of *Le Feuvre v. Lankester* (1854), 3 E. & B. 530, 544 was principally relied on by the defendant and there are expressions in the judgment of the Court to which our attention was very properly directed as having a bearing upon the case before us. That was an action for a penalty against the defendant for having acted as an alderman while as the plaintiff alleged he was disqualified under an Act which forbade any one from acting as alderman "during such time as he shall have directly or indirectly by himself or his partner any share or interest in any contract or employment with, by or on behalf of such council."

The interest of the defendant relied on by the plaintiff in that case was his having sold some iron to a person who had contracted to supply the council with iron railings and who purchased the iron for the purpose of using it in the performance of his contract. It was held that the

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Street, J.

mere fact that the defendant had sold to the contractor iron which the latter intended to use in performing his contract did not give the defendant an interest in the contract within the meaning of the section. The Court say that the facts give "the defendant no share or interest in the contract, the existence of which neither affects the price of his goods, nor the manner in which he is to be paid for them." Their answer to the argument that the case is brought within the mischief of the statute because the defendant might have to decide on the quality of his own goods, is this: "Even if the case be brought within the mischief, it is not within the words of the enactment: and we must not strain a penal enactment so as to bring cases within it."

The actual point for the decision of the Court in that case was whether the mere fact that the defendant had supplied iron to a contractor who intended to use it in performing his contract with the corporation, gave the defendant an interest in the contract, in the absence of any condition or undertaking on his part that the iron should answer the requirements of the contract. Their decision upon this point in the defendant's favour does not at all govern the present case.

See, on the other hand, the case of *Nutton v. Wilson* (1889), 22 Q. B. D. 744, in which the Court of Appeal felt themselves bound to give a liberal construction to a similar statute in order to bring within its effect certain acts of a defendant which they thought clearly within the mischief intended to be provided for.

The defendant here, then, was in this position with regard to his contract with the plaintiff, that it was impossible that the consent of the council could be given to the subletting of the stone work to him so long as he remained a member of the council, and it was his duty to resign that position. He seeks to excuse himself by saying that members of the council had told him that they would not consent to the sub-contract even if he did resign his seat. That is no excuse; his duty was at all events to resign so

as to give them an opportunity of giving their consent to it, and by not performing this duty he must be taken to have prevented them from giving their consent. Judgment.
Street, J..

In my opinion the judgment in favour of the plaintiff was right, and the motion should be dismissed with costs.

G. F. H.

IN RE LAZIER.

Extradition—Private Prosecutor—Authority of Foreign Government—R. S. C. ch. 142—Corroboration.

It is not necessary that it should appear on the face of extradition proceedings under R. S. C. ch. 142, or otherwise, that the information or complaint against the prisoner was laid or made by or under the authority of the foreign Government; but the extradition Judge may receive the complaint of anyone who, if the alleged offence had been committed in Canada, might have made it.

Canadian enactments and practice in this regard contrasted with those of the United States.

Semble, that if an act criminal according to the laws of both countries be committed, the guilty person can be extradited, although it constitute forgery under the laws of one, and larceny under those of the other, both being extraditable offences.

Semble, also, that the provisions of the Criminal Code as to corroboration (55-56 Vict. ch. 29, sec. 684 (D.)) refer to the trial, and not to the preliminary enquiry before the magistrate.

THIS was a motion for the discharge of a prisoner who had been committed for extradition to the United States on grounds which, with the facts of the case, are stated in the judgment of MEREDITH, C. J., before whom the motion was argued on January 10th, 1899. Statement.

Smyth, for the prisoner, objected that the extradition Judge should not, as here, report to the Minister of Justice before there was evidence before him that the proceedings were taken on motion of the foreign State; that secs. 6, 13 of the Extradition Act, R. S. C. ch. 142, were analogous to the provisions in the United States statute: Revised Statutes of United States, 1878, secs. 5270-5280, p. 1021;

Argument. and the American authorities establish this contention: *In re Kelly* (1886), 26 Fed. R. 852; *In re Extradition of Ferrelle* (1886), 28 Fed. R. 878; *In re Extradition of Herris* (1887), 32 Fed. R. 583; Clarke's Law of Extradition, 3rd ed., p. 218. He also contended that the evidence was insufficient; no forgery was shewn nor false pretences: *In re Murphy* (1895), 22 A. R. 386; *The Queen v. Moseley* (1861), 31 L. J. Mag. 24; Roscoe's Law of Criminal Evidence, 11th ed., p. 493: that some of the evidence was taken before any proceedings were pending, and was therefore inadmissible: *Regina v. Browne* (1881), 6 A. R. 386; *In re Weir* (1887), 14 O. R. 389; *In re Phipps* (1883), 8 A. R. 77, 100; and that there was no corroborative evidence: *Regina v. Hagerman* (1888), 15 O. R. 598; *In re Henry Garbutt* (1891), 21 O. R. 465.

Curry, for the Crown, as to the first objection, referred to *In re Ferdinand Hugo Kolligs* (1874), 6 Rev. Leg. 213; *Ex parte Phelan* (1883), 6 Leg. N. 261; *Ex parte Martin* (1868), 4 L. J. N. S. 198; Imp. 6-7 Vict. ch. 76; 12 Vict. ch. 19 (C.); 31 Vict. ch. 94 (D.); 33 Vict. ch. 25 (D.). As to the depositions contended to be inadmissible, he cited *In re Cornelius Murphy* (1894), 26 O. R. 163, and contended that the return was not in Court till read in Court, and the proceedings now before the Court must be held to have been made upon the first return before the extradition Judge: *In re Weir* (1887), 14 O. R. 389; R. S. C. ch. 142, sec. 9; Criminal Code, 55-56 Vict. ch. 29, sec. 590. As to the offences being sufficiently proved: *Rex v. Peacock* (1814), R. & R. 278; *In re Lee* (1884), 5 O. R. 583.

Smyth, in reply, referred to Hawley on International Extradition, pp. 2, 35, 88.

February 4th, 1899. MEREDITH, C. J.:—

The prisoner has been committed for extradition to the United States of America by the junior Judge of the County Court of the county of Hastings, acting as extradition Judge under the provisions of R. S. C. ch. 142,

upon eight charges, four of them of forgery, three of receiving money obtained by fraud, and one of obtaining money by false pretences.

Judgment.
Meredith,
C.J.

The proceedings having been removed into the High Court by two writs of *certiorari* directed to the extradition Judge, dated respectively November 30th, 1898, and December 24th, 1898, and the prisoner having obtained a writ of *habeas corpus*, now moves for his discharge from custody.

Upon the argument of the motion various objections were taken to the regularity of the proceedings before the extradition Judge, and to the sufficiency of the material before him to justify the warrants of committal issued by the learned Judge under section 12 of the Act, by the authority of which the prisoner is detained in close custody in the common gaol of the county of Hastings.

The first objection is that nothing appears on the face of the proceedings to shew that the informations or complaints laid before the extradition Judge which are the foundations of the proceedings against the prisoner were laid or made by or under the authority of the Government of the United States, and that they were in fact not so laid or made and that that being the case the extradition Judge acted without jurisdiction and the proceedings before him are therefore void.

If the view adopted by the Courts of the United States of the effect of the provisions of the Federal Statute (sec. 5270 of the Revised Statutes), which is the analogue of sec. 6 of the Canadian Act, is to prevail in the construction of the latter enactment, the prisoner's objection must be given effect to, for the preponderance of American judicial opinion, as the cases cited by Mr. Smyth shew, is that it must appear that the person who makes the complaint has the authority of the foreign Government for making it (Moore on Extradition, vol. I., par. 279), though Mr. Justice Lowell, in *In re J. Dugau* (1874), 2 Lowell 367, came to a different conclusion. In some of the cases it is held that the authority must appear upon the face of the

Judgment. complaint, but in others it is deemed sufficient if it appear
Meredith, in the course of the proceedings before the commissioner,
C.J. as the functionary who occupies in the United States the same position as does the extradition Judge in Canada, is called.

The practice, however, which has been adopted in Canada and has been in this respect, as far as I can ascertain, uniform, is based upon a different and I venture to think more liberal interpretation of the provisions of the Canadian Acts and the jurisdiction of the extradition Judge has not been thought to depend upon the information or complaint being laid or made by, or at the instance and under the authority, of the foreign Government, but the Acts have been treated as authorizing the extradition Judge to receive the complaint of any one who if the alleged offence had been committed in Canada might have made it.

Mr. Blake, the then Minister of Justice for Canada, in a communication to the Secretary of State for the Colonies, dealing with the question of the extradition arrangements existing and proposed between this country and the United States, and dated June 27th, 1876, pointed out this difference between the practice which prevailed in the two countries.

I extract the following passages from that communication: "6. The practice in Canada has always been to apprehend, examine, and discharge or commit for extradition, without the necessity of a previous requisition from the United States; and this practice answers well.

"In the United States the practice has, as I am informed by a person of experience, been different, and not uniform. The subject was discussed in the case of Kaine in 14 Howard's Reports, and various opinions were expressed by the Judges; and I am told that the commissioners have held in some cases that the authority or notification of the president is necessary to justify even the apprehension, and in many or most cases that this authority is necessary to justify the detention, of the fugitive, and the examination

into his case : " Dominion Sessional Papers, vol. 10, No. 7 (13), pp. 17-19. Judgment.

Meredith,
C.J.

It is true that in the case referred to by Mr. Blake (*In re Kaine* (1852), 14 Howard 103), the question which arose was not as to whether the complaint must be made by the foreign Government but as to the necessity of a mandate from the President in order that jurisdiction should be conferred on the extradition Judge to act, and I refer to Mr. Blake's communication only for the purpose of shewing that his inquiry had led him to the conclusion to which I have come as to what has been the uniform practice in Canada as to the initiation of proceedings for the extradition of offenders under the Canadian Acts ; and even if I had come to the conclusion that it was founded on an erroneous view of the effect of the Canadian Act, I should not feel warranted in departing from a practice which has been so long established and so uniformly followed.

I am, however, of opinion that whatever may be the proper view of the scope and effect of the United States statute the Canadian practice is in accordance with the provisions of the Canadian Act which differ in important respects from those of the United States statute.

Very soon after the Ashburton Treaty was entered into, it was found that the provisions of the Imperial Act which was passed for giving effect to it (6-7 Vict. ch. 76) were unsuited to Canada, and accordingly in the year 1849 a Canadian Act was passed for giving effect within the then Province of Canada to the treaty (12 Vict. ch. 19).

In the preamble to this Act it is recited that certain provisions of the Imperial Act had been found inconvenient in practice in the Province and more especially that provision which required that before any offender should be arrested a warrant should issue under the hand and seal of the person administering the Government to signify that the requisition had been made by the authority of the United States for the delivery of the offender and to require all justices of the peace and other magistrates

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and officers of justice within their several jurisdictions to govern themselves accordingly, and to aid in apprehending the person so accused and committing such person to gaol for the purpose of being delivered up to justice according to the provisions of the treaty, inasmuch as by the delay occasioned by compliance with the said provision an offender may have time afforded to him for eluding pursuit, and it was by the 1st section enacted that "it shall be lawful for any of the Judges of any of Her Majesty's Superior Courts in this Province, or for any of Her Majesty's justices of the peace in the same, and they are hereby severally vested with power, jurisdiction and authority, upon complaint made under oath or affirmation, charging any person found within the limits of this Province with having committed, within the jurisdiction of the United States of America, or of any of such States, any of the crimes enumerated or provided for by the said treaty, to issue his warrant for the apprehension of the person so charged, that he may be brought before such Judge or such justice of the peace, to the end that the evidence of criminality may be heard and considered; and if on such hearing, the evidence be deemed sufficient by him to sustain the charge according to the laws of this Province, if the offence alleged had been committed therein, it shall be his duty to certify the same, together with a copy of all the testimony taken before him, to the Governor or Lieutenant-Governor of this Province, or to the person administering the government of the same for the time being, that a warrant may issue, upon the requisition of the proper authorities of the said United States or of any of such States, for the surrender of such person, according to the stipulations of the said treaty; and it shall be the duty of the said Judge or of the said justice of the peace to issue his warrant for the commitment of the person so charged to the proper gaol, there to remain until such surrender shall be made, or until such person shall be discharged according to law."

By order in council of March 28th, 1850, the operation

of the Imperial Act was under the authority of its 5th section suspended in Canada for so long as the provincial enactment should continue in force.

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C.J.

Changes have since taken place both in the Imperial and the Canadian Acts, but the Imperial statutes are under the authority of sec. 18 of the Extradition Act of 1870, 33-34 Vict. ch. 52, suspended in Canada as far as relates to the United States of America, and the Ashburton Treaty, and the supplementary convention of July 12th, 1889, and for as long as the Canadian Act continues in force, by Orders in Council of November 17th, 1888: (Statutory Rules and Orders Revised, vol. 3, p. 181); and March 21st, 1890 (*ibid.* 1890, p. 644).

The Imperial Acts now in force are the Extradition Act of 1870 (33-34 Vict. ch. 52), and the Extradition Act of 1873 (36-37 Vict. ch. 60), and the Canadian Act is now ch. 142 of the Revised Statutes of Canada.

Sub-sec. 1 of sec. 6 of the Canadian Act is similar in its terms to sec. 5270 of the Revised Statutes of the United States as far as the latter section deals with the making of the complaint, but the Canadian Act differing in this respect from the United States statute, provides that the extradition Judge is forthwith, after issuing his warrant for the apprehension of the offender, to send a report of the fact of the issuing of the warrant, together with certified copies of the evidence and foreign warrant, information or complaint, to the Minister of Justice (sub-section 2), and authorizes the Minister of Justice, if he at any time determines that the foreign state does not intend to make a requisition for surrender by order under his hand and seal, to cancel any warrant issued by an extradition Judge under the Act (section 15c).

These provisions indicate, I think, that Parliament did not deem it essential that the complaint should be made by or on behalf of the foreign Government, but recognized the existing practice, which was in accordance with the policy which dictated the legislation of 1849, that it might be made by any one who might have made it had the al-

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leged offence been committed in Canada, and by the provisions to which I have referred guarded against the danger of injustice being done to an accused person by the charge being made by a private individual, and the foreign Government not in the end making a requisition for his surrender, and against this country being put to the expense of the inquiry, which, if the requisition for surrender were made, ought under the terms of the treaty to be borne by the Government making the requisition, and which that Government would not be answerable for unless it had intervened to request the surrender. These two dangers appear to have had an important effect upon the United States Courts in bringing them to the conclusion that the complaint must be by the foreign Government or on its behalf.

Apart from the considerations I have mentioned, I see no good reason why effect should not be given to the plain language of section 6. Why import into the section some thing that is not to be found, in terms at all events, in its provisions? Why must Parliament be taken not to have meant as it says that the complaint may be made by anyone who might have made it had the alleged offence been committed in Canada? I cannot understand that there is anything disrespectful to the Government of this country in the complaint being made by a private person directly to the tribunals constituted to examine into complaints for extradition offences, instead of through the foreign Government. It is, I think, a complete answer to such a suggestion that, upon the construction I would give to section 6, the private person makes his complaint by the express authority of the Canadian Parliament.

It was further objected that the evidence adduced before the extradition Judge was not sufficient to justify the committal of the prisoner—that it does not shew that any crime, or at all events, that any extradition crime was committed by him.

This objection also, in my opinion, fails.

There was, I think, ample evidence of acts done by the

prisoner which, if they had been done in Canada, would have justified his committal for trial on each of the four charges of forgery upon which he has been committed.

The case of *In re Cornelius Murphy* (1894), 26 O. R. 163, is conclusive against the prisoner on this branch of the case.

There was evidence in each case that the prisoner took an assumed name ; that he assumed that name for the purpose of the fraud which he subsequently committed ; that in that name he drew the bills of exchange ; that the persons in whose names the bills were drawn were fictitious persons ; that the prisoner falsely represented each of them to be real persons, to be in the employment of the persons upon whom the bills were drawn, and that he had authority from these persons to draw upon them for the amounts of the bills ; that the bills were drawn with intent to defraud, and that in each case persons were by these means actually defrauded.

There was therefore, I think, beyond question, evidence that the bills were false documents, and that the prisoner had been guilty of forgery in respect of them.

The Court of Appeal was in the *Murphy* case equally divided in opinion as to the correctness of the decision of the Divisional Court, the present Chief Justice and Mr. Justice Osler thinking that a case had not been made for the committal of the prisoner, but for a reason that does not apply to this case, viz., that the account upon which the alleged forged cheque was in that case drawn was a genuine one, and there was no false representation as to the drawer of the cheque. In this case, as I have already pointed out, both of these elements are supplied by the evidence, and, as I understand the judgments of those learned Judges, on the facts of this case they would agree that the offence of forgery is made out.

No question such as was raised in the *Murphy* case as to the offence, though forgery according to the law of Canada, not being forgery according to the law of the foreign country, was raised in this case ; but even if the

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C.J.

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C.J.

offence were not forgery but larceny in the United States, I do not see why the prisoner should not be extradited, the offence of larceny being one of those embraced in the treaty arrangements with the United States. It would appear to me an anomalous state of things if it were otherwise, for the result would be that though an act, criminal according to the laws of both countries and in each an extradition crime, were committed, the guilty person could not be extradited unless the offence were the same according to the laws of both countries.

I do not think that the committal of the prisoner on the three charges of receiving money obtained by fraud is warranted by the evidence. The facts disclosed in each case the offence of obtaining money or the signature to a bill of exchange by false pretences, but that is a different offence from the offence of receiving money obtained by fraud, and is not within the terms of the treaty.

Nor was the committal of the prisoner on the charge of false pretences justified. As I have said, that is not one of the offences included in the treaty arrangements with the United States, but Mr. Curry contended that nevertheless, being one of the offences mentioned in the schedule to the Extradition Act, R. S. C. ch. 142, the Act authorized the committal of the prisoner.

I am unable to agree to that argument. The Act, differing in this respect from the previous enactments, deals not merely with the treaty arrangements with the United States, but is applicable to any and all extradition treaties between Great Britain and any foreign state which extend to Canada, and the list of crimes which the schedule contains includes offences not within the scope of the treaties with the United States, and was inserted in the Act, as section 24 shews, in order to declare how the crimes mentioned in it were to be construed for the purpose of any treaty which might exist in which they or any of them are included. As was said by Lord Russell of Killowen, C.J., referring to the corresponding provision of the English Act, "There is no doubt that in order to justify a

committal the offence for which the accused is committed must come within the language both of the treaty and of the Extradition Act:" *In re Arton*, [1896] 1 Q. B., at p. 112.

Judgment.
Meredith,
C.J.

Objection was also made to the admissibility of certain depositions taken in the United States. I think that the evidence was admissible upon the authority of *In re Coun- haye* (1873), L. R. 8 Q. B. 410, and *In re Weir* (1887), 14 O. R. 389. But, however that may be, excluding that evidence altogether, sufficient remained to warrant the committal of the prisoner on the charges of forgery.

Objection was taken also to the certificates of the extradition Judge on the stenographer's notes of the evidence, because they do not set out the names of each of the deponents, but I think they are sufficient; the depositions are fastened together and the certificates are endorsed on the back of them, and there is besides the affidavit of the stenographer identifying them, so that there can be no doubt as to what the certificates refer to, and they are, moreover, returned by the extradition Judge as being the evidence taken before him. Even if they were insufficient, leave might and should be given to take them off the files in order that proper certificates be supplied. The warrants for the committal of the prisoner being as they are valid upon the face of them, the prisoner's motion must fail unless upon the material before the extradition Judge they ought not to have been issued. That can be determined only when that material is before us. It was to bring it before us that the writs of *certiorari* were issued. The evidence having been taken in shorthand by a stenographer, the notes of the evidence must be extended and the transcript verified as directed by sub-sec. 7 of sec. 590 of the Criminal Code, 1892, 55-56 Vict. ch. 29, but there is nothing in the Act which requires that this should be done before the committal of the accused takes place, and I see no reason why it may not be made and returned in obedience to the writ of *certiorari* after the return to the writ of *habeas corpus* is made.

Judgment.
Meredith,
C.J.

Mr. Smyth further urged that there was no corroboration such as he contended is required under sec. 684e of the Code, but there are, I think, two answers to this objection: (1) There was the corroboration which is said to be required; (2) the section does not apply to the preliminary inquiry before a magistrate, but to the trial of the prisoner.

What the section forbids without the corroboration it provides for is not the committal of the accused for trial, but his conviction. This was the view of the late Sir Adam Wilson (*In re Lee* (1884), 5 O. R., at p. 597), and is, I think, plainly the effect of the section.

The result is that the application fails and the prisoner must be remanded, but only upon the four charges of forgery.

A. H. F. L.

RE McLEAN V. OSGOODE.

Division Courts—Jurisdiction—Notice Disputing—Extending Time for—Prohibition.

A Division Court Judge has no power after the expiry of the time limited by sec. 205 of the Division Courts Act, R. S. O. ch. 60, for the giving of notice of intention to contest the jurisdiction of the Court, to grant leave to file a notice disputing it.

Statement.

THIS was an application for a writ of mandamus directed to the junior Judge of the county of Middlesex to compel him to try a certain action in the First Division Court of that county, in which one Angus McLean, was primary creditor, Henry Osgoode, primary debtor, and Messrs. Struthers & Co., garnishees.

The time for entering a notice disputing the plaintiff's claim had expired, and the Judge granted leave to enter a notice disputing claim and the jurisdiction of the Court, and at the trial declined to try the action and made an

order transferring it to the Third Division Court of the county of Waterloo, where the cause of action was alleged to have arisen. Statement.

The motion was argued in Chambers at London, on 2nd February, 1899, before FALCONBRIDGE, J.

J. W. Winnett, for the primary creditor.

P. Mulkern, for the primary debtor and garnishee.

February 15, 1899. FALCONBRIDGE, J. :—

Mr. Mulkern withdrew his objection to my hearing this motion in London and agreed that it should be dealt with on the merits, as if heard in Toronto.

The only real question in the case is whether, after the expiry of the time limited by sec. 205 of the Division Courts Act, R. S. O. ch. 60, for giving notice of intention to contest the jurisdiction of the Court, the learned Judge had power to grant leave to the primary debtor to dispute the plaintiff's claim and to direct the clerk to accept the notice disputing the plaintiff's claim and the jurisdiction of the Court, and to send out all proper notices in respect thereof.

Mr. Mulkern contended that, assuming that the Judge had not such power, the plaintiff ought to have promptly moved for prohibition, and that by proceeding to trial he acquiesced in the order.

This does not appear to be the law. Mr. Winnett swears that on both occasions, viz., upon the return of the motion to allow defence disputing jurisdiction and at the trial, he objected to the notice being allowed or the question of jurisdiction gone into, relying on sec. 176 of the Act R. S. O. 1887 ch. 51 (now sec. 205, ch. 60, R. S. O. 1897).

If an inferior Court declines to hear and determine a case, erroneously deciding that it has no jurisdiction, mandamus to hear and determine will be granted: *Regina v. The Judge of the Southampton County Court* (1891), 65

Judgment. L. T. N. S. 320; Shortt's Informations, Mandamus and
Falconbridge, Prohibitions, 314 (296*); *In re Burns v. Butterfield*
J. (1854), 12 U. C. R. 140. As to acquiescence by appearing
at trial still taking exception to jurisdiction, see *Gibbons*
v. Chadwick (1892), 12 C. L. T. 207.

I am reluctantly driven to the conclusion that the time for giving the notice under section 205 cannot be extended. See the cases decided as to applications for new trial, and cited on p. 212 of Bicknell & Seager's Division Court Act, vol. 1. True, in section 152, ch. 60, R. S. O. 1897 (old section 145), the provision is that the *Judge may*, etc.: whereas in section 205 it is the *party shall*, etc.; but I think the authorities cited on present section 90 by Bicknell & Seager, vol. 1, p. 118, are in this direction, particularly *Barker v. Palmer* (1881), 8 Q. B. D. 9, where similar words were held to be obligatory and not merely directory.

See also *Re Coe v. Coe* (1891), 21 O. R. 409; *Clarke v. Macdonald* (1883), 4 O. R. 310; where it is shewn that the rule or practice of the High Court cannot apply to a case of this kind.

Section 203 of the Act cannot help the defendant, nor can Division Court Rule 250.

The plaintiff is entitled to his order with costs of this motion.

G. A. B.

[DIVISIONAL COURT.]

MEEHAN V. PEARS.

Assessment and Taxes—Taxes of Former Years—Tenant Primarily Liable—R. S. O. ch. 224, sec. 26.

By the Assessment Act, R. S. O. ch. 224, sec. 26, any occupant may deduct from his rent any taxes paid by him if the same could also have been recovered from the owner, or previous occupant, unless there is a special agreement between the occupant and the owner to the contrary:—

Held, that under the above section a tenant is not at liberty to deduct from the rent and to compel his landlord to pay taxes for which the tenant and others were jointly assessed for a year prior to his existing tenancy.

Heyden v. Castle (1888), 15 O. R. 257, discussed.

THIS was an appeal from a junior Judge of the county of York. Statement.

The action was brought by the plaintiff as lessor against the defendant as lessee for a balance of rent due under a lease, which the defendant claimed to be entitled to deduct from the rent and to retain by virtue of the provision contained in sec. 26 of the Assessment Act, R. S. O. ch. 224.*

The premises in question originally belonged to one Leonard Pears, father of the defendant, who had in the year 1888 mortgaged them to the plaintiff.

The plaintiff entered into possession under her mortgage, and disputes arose between her and defendant's brother, one James Pears, who was then tenant, as to his right to remove certain machinery and trade fixtures placed thereon by him; and it was agreed between them and the defendant, that James Pears should sell the machinery and fixtures to the defendant and the plaintiff should relin-

* 26. Any occupant may deduct from his rent any taxes paid by him, if the same could also be recovered from the owner or previous occupant, unless there is a special agreement between the occupant and the owner to the contrary.

Statement.

quish any claims she had on them as mortgagee, and lease the premises to the defendant for the term of five years from the 1st of April, 1898.

In the lease which was executed between the plaintiff and defendant, pursuant to the above agreement and in pursuance of the Act respecting Short Forms of Leases, the defendant covenanted "to pay taxes except for local improvements."

Prior to this, in 1889, the defendant and his brother had leased the premises from their father, for a term of ten years, and carried on business there under the name of The Davisville and Carleton Brick Company, but that partnership had been dissolved in January, 1897, and James Pears had continued the business taking a new lease from his mother who had become the owner in the meantime.

All three, the father, and the two brothers, James and William, the defendant, were assessed as owners of the premises for the year, 1897, and the taxes for that year were not paid.

In the year, 1898, after the defendant had entered into possession under his lease from the plaintiff, a warrant was issued to a bailiff to collect the taxes for 1897, and the defendant paid them and deducted them from his rent.

The action for the amount retained, claiming it as rent, was brought in the tenth Division Court of the county of York, and was tried on the 16th of August, 1898, before His Honour Judge Morson, one of the junior Judges of the county, who considered himself bound by the decision in *Heyden v. Castle* (1888), 15 O. R. 257, and held that by the terms of the lease the defendant was liable to pay the taxes and gave judgment for the plaintiff with costs, and on application being made refused to grant a new trial.

From this judgment the defendant appealed, and the appeal was argued on the 8th February, 1899, before a Divisional Court composed of MEREDITH, C.J., and MACMAHON, J.

W. E. Raney, for the appeal. The short forms' covenant "to pay taxes" used here is substantially the same as that in *Macnaughton v. Wigg* (1874), 35 U. C. R. 111, and *Heyden v. Castle* (1888), 15 O. R. 257. Both these cases relate to taxes for the year in which the lease was made, and although Wilson, J., in his dissenting judgment, makes a distinction between the former case and one where the taxes might be those of a prior year, *Macnaughton v. Wigg*, is really a unanimous decision in favour of the tenant. The distinction drawn in *Heyden v. Castle* by STREET, J., between the words of the covenant there and in *Macnaughton v. Wigg* (and as the judgment of ARMOUR, C. J., in the latter case went off on another point), is a mere dictum as against the previous unanimous judgment. Apart from authority, where a tenant has covenanted to pay all taxes "now charged or hereafter to be charged" he would be as much liable to pay for the year or years after his term expired as the year or years before the term began which neither the Legislature nor the parties ever intended.

W. H. Irving, contra. Section 26 of the Assessment Act does not cover this case. It contemplates a previous occupant liable for the taxes whose liability is in no way connected with the occupant obliged to pay, not as here, when the previous occupant and the person obliged to pay were jointly assessed as owners of the freehold. *Heyden v. Castle*, applies to taxes for years prior to the making of the lease as well as the current year's taxes. There is a plain distinction as pointed out by STREET, J., between taxes *charged on certain land* and taxes *charged in respect of certain land*. The former describes an incumbrance or charge on the land, the latter describes the class of taxes collectable in respect of the land.

Raney, in reply.

February 18, 1899. MEREDITH, C.J. :—

The plaintiff sued to recover the balance of a quarter's rent which she claimed to be due to her by the defendant under the terms of a lease dated 31st March, 1898, from

Argument.

Judgment. her to him, and the defence was that the defendant had
Meredith, paid and was entitled to deduct from the rent \$132.60 (the
C.J. balance claimed by the plaintiff) under the provisions of
sec. 26 of the Assessment Act (R. S. O. 224) as being taxes
recoverable from a former occupant of the premises within
the meaning of that section.

The defendant was assessed jointly with his father, Leonard Pears, and his brother, James, in and for the year 1897, for the premises, they being jointly assessed as freeholders; but the defendant's contention is, and there was evidence to support it, that he should not have been assessed for that year—the premises being then occupied by James Pears—and the defendant having no interest in them as owner or occupant. The taxes for 1897 are the taxes in question.

The learned County-Court Judge gave judgment for the plaintiff, holding that the defendant was bound to pay the taxes for 1897 under the terms of his lease, which contains the statutory short form covenant "to pay taxes except for local improvements," and he treated *Heyden v. Castle* (1888), 15 O. R. 257, as an authority for his decision.

It is unnecessary in the view we take to decide whether *Heyden v. Castle* is an authority for that which the learned County Court Judge thought was decided by it, and it may well be that reading the language of my brother Street's judgment in the light of the facts of the case before the Court, all that he meant was that the taxes of 1880, the year in which the lease was made and the term began, were taxes which by the terms of the defendant's covenant he was bound to pay as taxes then charged on the land. If his language is not to be so read, his opinion would conflict with that of the late Chief Justice Wilson in *Macnaughton v. Wigg* (1874), 35 U. C. R., at p. 120. "I should doubt, unless the very plainest language were used, expressly applicable to prior years' rates, whether they could be held to be within the words of this lease; but such previous years' rates are not in question."

But assuming the defendant's contention as to the con-

struction of the covenant to be well founded, he must nevertheless, in our opinion, fail, because the taxes which he seeks to deduct from the rent are not taxes recoverable from a previous occupant within the meaning of section 26. It never can have been intended that a tenant should be at liberty to deduct from the rent and to compel his landlord to pay taxes for which he was himself primarily liable; and if not, the fact, if it be the fact, that the defendant was improperly assessed for the year, 1897, is not material. If the assessment was improper he should have availed himself of his right of appeal, and not having done so the assessment is conclusive between him and the municipality at all events, and I know of no principle upon which, had he not been a tenant of the premises in 1898 but had been called on to pay the taxes of 1897 and had done so, he could have claimed to recover what he had paid from the defendant who was not the owner but only a mortgagee of the premises; and if that be so why should the fact that he happened to become tenant in 1898 alter the rights of the parties in this respect. The section must, we think, necessarily be read as referring to taxes for which the tenant is not himself the primary debtor.

It is satisfactory to know that this result is, in the circumstances detailed in Mr. Kilmer's evidence, less unfair to the defendant than to fix the liability for these taxes on the plaintiff would be unjust to her.

The appeal must be dismissed with costs.

MACMAHON, J.:—

I agree.

G. A. B.

Judgment.

Meredith,
C.J.

[DIVISIONAL COURT.]

WALLACE V. PEOPLE'S LIFE INSURANCE CO.

County Courts—Counterclaim—Amount to be Set Off—R. S. O. ch. 55, secs. 28, 29.

In an action in a County Court to recover an amount due for salary and travelling expenses there was a counterclaim for advances made to the plaintiff. The plaintiff recovered \$308.55, and the amount found to be due under the counterclaim was \$1,169.54, but the Judge allowed only \$200 to be set off:—

Held, that under secs. 28 and 29 of the County Courts Act, R. S. O. ch. 55, the defendants were entitled to judgment on the counterclaim to the full amount of the plaintiff's claim.

Judgment of the County Court of Carleton varied.

Statement.

THIS was an action brought in the County Court of the county of Carleton by the plaintiff to recover a balance claimed to be due by the defendants to him for salary and travelling expenses.

The defendants counterclaimed for advances made to the plaintiff.

The action was tried before the senior County Judge of the county of Carleton who directed judgment to be entered against the defendants for the amount of \$308.55. The amount of the counterclaim was \$1,168.54, but he only allowed it to the extent of \$200.

From this judgment the defendants, on January 20th, 1899, appealed to a Divisional Court composed of MEREDITH, C. J., ROSE, and MACMAHON, JJ.

Warren, for the appellants.

The respondents did not appear.

February 21, 1899. The judgment of the Court was delivered by

MACMAHON, J.:—

After trial of the action, the learned county court Judge directed that judgment be entered for the plaintiff on his claim against the defendants for \$308.55 together

with the costs of the action, and he found that the plaintiff was indebted to the defendants on their counterclaim in a sum much in excess of the amount found to be due from the defendants to the plaintiff—namely in the sum of \$1,168.54—but he refused to direct judgment to be entered for the defendants on their counterclaim for more than \$200 with costs, and there was a direction that the judgments so directed to be entered, should be set off *pro tanto*.

Judgment.

MacMahon,
J.

The defendants' contention in the court below was that they were entitled to judgment on their counterclaim for an amount equal to that found due by the defendants to the plaintiffs, and the appeal is on the ground of the refusal of the county court Judge to so direct.

By sec. 28 of the County Courts Act, R. S. O. ch. 55, "Every county court shall have legal and equitable jurisdiction and shall, as regards all causes of action within its jurisdiction, for the time being, have power to grant and shall grant, in any action or proceeding in such Court such relief, redress or remedy, or combination of remedies, either absolute or conditional, including the power to grant vesting orders, and to relieve against penalties and forfeitures, and shall in every such action or proceeding give such and the like effect to every ground of defence or counterclaim, equitable or legal (subject to the provision hereinafter contained) by and upon the same mode of procedure, and in as full and ample a manner as might and ought to be done in the like case by the High Court."

Section 29 provides: "Where in a proceeding before a county court any defence or counterclaim of the defendant involves matter beyond the jurisdiction of the court, such defence or counterclaim shall not affect the competence or the duty of the court to dispose of the whole matter in controversy so far as relates to the demand of the plaintiff and the defence thereto, but no relief exceeding that which the court has jurisdiction to administer shall be given to the defendant upon such counterclaim."

Judgment.MacMahon,
J.

These sections are the same in effect as sections 89 and 90 of the English Judicature Act of 1883, except that in section 90 of the English Act provision is made for the transference on the application of either party of the action from an inferior court to the High Court. In our Act a provision as to transference, is, in somewhat similar terms found in section 32.

The question that arises here arose in *Davis v. The Flagstaff Silver Mining Company of Utah*, 3 C. P. D. 228, where an action was brought in the Lord Mayor's Court of London upon two promissory notes given by the secretary of the defendant's company for the sums of £100 and £400 respectively. To this action the defendants pleaded never indebted, payment, set-off, and a counterclaim. By the counterclaim the defendants, after setting forth transactions in the United States between the plaintiff and the defendants with respect to a mine situate at Utah, claimed, *inter alia*, that certain sub-contracts executed in America should be declared to be not binding on the defendants, and that the plaintiff should be ordered to pay to them money alleged to have been there received by him on their behalf amounting to £89,000.

A summons was taken out to shew cause why a writ of prohibition should not issue against the defendants' counterclaim and was referred by Field, J., to the court which refused prohibition.

The case went to the Court of Appeal, and Brett, L. J., at p. 236, referring to section 90, says: "Then the section enacts in what respect the inferior court shall have no jurisdiction; 'but no relief exceeding that which the court has jurisdiction to administer shall be given to the defendant upon any such counterclaim.' My construction of those words is that the inferior court may deal with the counterclaim, which, if it were an original claim, would be beyond its jurisdiction, to the extent of answering the claim of the plaintiff, but not further." And, at p. 237, he says: "Where the counterclaim is pleaded, if it is shewn that that counterclaim if treated in a superior court

might give rise to a decree in favour of the defendant, then if that counterclaim is beyond the jurisdiction in other respects, section 90 limits the power of the inferior court to entertain it only so far as it is a defence to the demand. This construction gives effect to all the words of both sections."

Judgment.
MacMahon,
J

And Lord Justice Cotton, at p. 239, says: "The whole matter in controversy is to be disposed of, and that referring to the previous part of the section" (90) "may be matter beyond the jurisdiction of the court. I think that the inferior court has jurisdiction to enter into all the matters involved both in the claim and counterclaim, though in the counterclaim there may be matters beyond the jurisdiction of the court, to see whether the plaintiff has a good demand, and if he has, whether by means of the counterclaim, the defendant can protect himself effectually against that demand. Then there comes a limitation 'but no relief can be given.' That is to say, no judgment shall be given to the defendant on matters beyond the original jurisdiction of the court. The defendant is to use the counterclaim as a shield, but not so as to enable him by means of a judgment to obtain payment of a sum of money beyond the amount of the plaintiff's claim."

And Lord Justice Thesiger says, at p. 241: "The Legislature had to deal with the question of defence and counterclaim; and reasoning *à priori*, I think anybody who had dealt with the subject and had observed the mode with which the Legislature had dealt with judicial proceedings in the High Court, would say that if a plaintiff chose to bring his action in an inferior court, justice would require that the defendant in that action should be entitled to set off, at all events to the extent of the plaintiff's claim, any demand which the defendant might have, wherever or however that demand might have arisen; otherwise a plaintiff might be enabled by choosing a particular court to obtain speedily a judgment involving the payment of money by a defendant, while at the same

Judgment. time the defendant might have a very much larger claim
MacMahon, which he could only sue for in a superior court.”
J.

At page 242 he says: “I think the words which follow, ‘but no relief exceeding that which the court has jurisdiction to administer shall be given to the defendant upon any such counterclaim,’ merely mean this: as soon as a judgment is obtained by the defendant of sufficient amount to overtop or rather equal the claim of the plaintiff, then if the counterclaim is *prima facie* beyond the jurisdiction of the court, the court shall hold its hand, and as regards the overplus of the counterclaim, that must be dealt with by some other court.”

In order that complete justice may be done between the parties, the judgment below will be varied by directing that judgment be entered for the plaintiff on his claim against the defendants for \$308.55 without costs, and that judgment be entered for the defendants on their counterclaim against the plaintiff for \$308.55 without costs the judgment of the defendants to be set-off against that of the plaintiff.

There will be no costs of the motion to either party.

G. F. H.

[DIVISIONAL COURT.]

BRADLEY V. BARBER ET AL.

*Injunction — County Courts—Injury or Threatened Injury to Goods—
Specific Damages.*

Under the Judicature Act, R. S. O. ch. 51, sec. 57, sub-sec. 4, and the County Courts Act, R. S. O. ch. 55, sec. 23, sub-sec. 11, when a cause of action is within the jurisdiction of a County Court, an injunction may in a proper case be granted to restrain an apprehended wrong, and a declaration of right may be made in a case whether substantive relief is sought or not in as full and ample a manner as in a case in the High Court. A threatened sale of a specific chattel which, if carried out, could have been compensated in damages, is not a proper case in which to grant an injunction restraining the sale.

Judgment of the County Court of Peel reversed.

THIS was an action tried before the Judge of the Statement.
county court of the county of Peel, who directed judgment to be entered for the plaintiff after a verdict found by a jury in his favour, and granted a perpetual injunction.

Watson, Q.C., and *Shaw*, for the defendants.

Morphy, for the plaintiff.

From this judgment the defendants appealed to the Divisional Court.

On the 20th January, 1899, before a Divisional Court composed of MEREDITH, C.J., ROSE, and MACMAHON, JJ., *Watson, Q. C.*, and *Shaw*, supported the appeal. The local Judge had no jurisdiction to grant an injunction for the apprehended damage without anything else being asked for which would give a good cause for action. The question of ownership could not have been tried, as the horse was in the possession of the plaintiff. The question of jurisdiction was raised in the defence and was brought to the notice of the plaintiff before the defence was put in by motion to strike out the case. Section 23 of the County Courts Act, R. S. O. ch. 55, defines what the jurisdiction of the county courts is and the class of cases in which the court can act, and no such power

Argument. as is sought here is conferred. Neither under the Judicature Act would there be any such power. Replevin or interpleader would not lie by reason of the horse being in the plaintiff's possession. In *Martin v. Bannister* (1879), 4 Q. B. D. 491, it was decided that under sec. 89 of the English Judicature Act, 36 & 37 Vict. ch. 66, which is the same as sec. 19 of R. S. O. (1887) ch. 47, now sec. 23 of R. S. O. (1897) ch. 55, an injunction will not be granted in such a case as this. It has also been so held in the Court of Appeal in *Whidden v. Jackson* (1891), 18 A. R. 439. The plaintiff's proper course was to sue for damages, if any, and the action should have been brought in the division court, and only division court costs should be allowed. The Court should therefore enter judgment for the defendant. In any event a new trial should be granted: *Grieve v. Molsons Bank* (1885), 8 O. R. 162.

Morphy, contra. The horse was not one of those assigned to the defendant, and never passed to the defendant; and therefore he had no right to interfere or attempt to take it. The Judge had jurisdiction to grant the injunction, for an injunction will lie when the plaintiff has good grounds for believing, as here, that the horse was about to be taken out of his possession. The plaintiff would have been seriously injured by the loss of the horse, and he was entitled to protect his property. He referred to *Parsons v. Hartman* (1894), 25 Oregon R. 547; *Fitchett v. Mellow* (1898), 18 P. R. 16; Bicknell and Seager's Division Courts Acts, Vol. i., p. 301; *Donaldson v. Wherry* (1898), 29 O. R. 552.

Watson, in reply, referred to the Annual County Courts Practice, 1895, p. 293-4.

February 21st, 1899. MACMAHON, J. :—

The plaintiff who had been in business as a merchant in Caledon East made an assignment in October, 1896, under R. S. O. ch. 124, for the benefit of his creditors, to Walter

S. Morphy, and in November following, at a meeting of creditors, William G. Webster was substituted in Morphy's place as assignee. The defendant Barber acted as Webster's agent and is a man of means.

Judgment.
MacMahon,
J.

The plaintiff claimed a horse, the subject of the action, as an exemption, and when the writ issued the horse being then in the plaintiff's possession, he applied for and obtained an injunction restraining the defendants from interfering with his possession of the horse, and asked for a declaration of right as to its ownership, and that the injunction be made perpetual.

The jury having found in favour of the plaintiff, there was a declaratory judgment that the horse was an exemption, and the learned county court Judge ordered that the injunction be made perpetual.

The highest value placed on the horse by any witness at the trial was \$75, while by others it was valued as low as \$20.

The solicitor for the assignee, in February or March, 1898, caused the defendant Heffernan, who is a constable and detective, to investigate and if possible discover the whereabouts of this horse, which the assignee claimed as being part of the estate of the plaintiff which should have been delivered to him—the assignee. Heffernan found the horse in possession of one Henry, who refused to give it up. A warrant was, according to paragraph 19 of the statement of defence, then obtained to search the premises of Henry, which was delivered to constable Broddy, who thereunder took the horse into his possession, and while so in his possession as an officer of the law in the *Queen v. Henry*, was removed by the plaintiff from the stable where Broddy had placed it; and a warrant being issued for his arrest charging him with stealing the horse, he—as stated in the 11th paragraph of the statement of claim—was brought before a magistrate who committed him for trial.

This motion might well be disposed of on the ground that the horse being *in custodia legis* when the plaintiff

Judgment. removed and took possession of it, the injunction order
MacMahon, should never, pending the adjudication on the criminal
J. charge, have been granted. But as the point is an important one, it were better in the interests of litigants that the question should be settled as to whether it was proper on the facts disclosed here that an injunction should under any circumstances have been granted and a declaration of right made.

Section 89 of the English Judicature Act, 36-37 Vict. ch. 66, provides: "Every inferior court which now has, or which may after the passing of this Act, have jurisdiction in equity, or at law and in equity, and in admiralty respectively, shall, as regards all causes of action within its jurisdiction for the time being, have power to grant and shall grant in any proceeding before such court, such relief, redress, or remedy, or combination of remedies, either absolute or conditional, and shall in every such proceeding give such and the like effect to every ground of defence or counterclaim, equitable or legal (subject to the provision next hereinafter contained) in as full and ample a manner as might and ought to be done in the like case by the High Court of Justice."

The 28th sec. of our County Courts Act, R. S. O. ch. 55, is almost an exact transcript of the above section, the words "County Court" in our Act being substituted in place of "inferior Courts" in the English Judicature Act.

In *Martin v. Bannister* (1879), 4 Q. B. D. 491, the Court of Appeal in England held that under the 89th section the county court had, in actions within its jurisdiction, power to grant an injunction against a nuisance, and to enforce observance of it by committal; but the Court declined to say whether the county court would have jurisdiction to grant an injunction against an apprehended injury.

Bramwell, L. J., said: "The argument is that section 89 gives no jurisdiction to the court; and that when a plaintiff applies to a county court for damages and an injunction at the same time he sets up two causes of action; one actual

damage already suffered, and the other, damage apprehended in the future. That doctrine is subtle. I am not sure that the county court would have jurisdiction if the only cause of action were apprehended damage. But if there has been actual damage, there is but one cause of action for which there are two remedies: damages and an injunction. The county court, then, has power to entertain a claim for damages and at the same time for an injunction to prevent a repetition of the injury.

Judgment.
MacMahon,
J.

Brett, L. J., said, at p. 492: "The first point argued was that the county court has no power to issue an injunction, because it is said that an injunction is not a remedy but a cause of action. I cannot see how an injunction can be called a cause of action; if it were so, it must exist before the action is brought, but an injunction does not. One cause of action is the existence of a nuisance, another may be the apprehension or threat of a nuisance. Those are both causes of action; but it may be that when there is only a threat of a nuisance, it may not be within the jurisdiction of a county court to grant an injunction. That point I do not decide."

Cotton, L. J., said, at p. 493: "There are two questions for our decision, first, has a county court jurisdiction to grant an injunction in a case in which a nuisance has been actually committed; secondly, can the county court enforce such injunction by attachment? There were two modes in which injunctions could be granted in Chancery: where the applicant had good reason to apprehend a nuisance would be committed, the Court would grant him an injunction: where the applicant had suffered actual damages, there also the Court of Chancery would grant an injunction as an additional remedy. At common law a party was entitled merely to recover damages. The Court of Chancery would also grant an injunction to prevent a repetition of the injury. That the granting of an injunction was merely an additional remedy, and not a new cause of action, is shewn by the fact that the Court of Chancery would give no damages but only granted an

Judgment. injunction ; and the common law courts could not grant
MacMahon, an injunction but merely give damages. It is unnecessary
J. to decide whether the County Court has power to restrain
an apprehended wrong."

In *Whidden v. Jackson* (1891), 18 A. R. 439, it was held that under sec. 28 of our County Courts Act (then sec. 21 of R. S. O. 1887 ch. 47), an action simply for a declaration of right was not within the jurisdiction of the County Court.

Since the decision in *Whidden v. Jackson*, the County Court Act was amended by 59 Vict. ch. 19, sec. 3 (now embodied in R. S. O. (1897) ch. 55, sec. 23, as sub-sec. 13 and 14), which gives county courts jurisdiction (sub-sec. 13) "In actions by any person seeking equitable relief in respect of any matter whatsoever, where the subject matter involved does not exceed \$200." (Sub-section 14) "In any action or contestation to establish the right of a creditor to rank upon an insolvent estate where the amount of such claim does not exceed \$400."

After the decision in *Martin v. Bannister* (1879), 4 Q. B. D. 491, a change was made in England by the Rules of 1893, Order XXV. R. 5, providing that "No action or proceeding shall be open to objection on the ground that a merely declaratory judgment or order is sought thereby, and the court may make binding declarations of right whether any consequential relief is or could be claimed or not."

That rule was introduced verbatim into our Judicature Act in 1885, by 48 Vict. ch. 13, sec. 5, and now forms sub-sec. 5, sec. 57, R. S. O. ch. 51.

Davey, L. J., in *Barraclough v. Brown* [1897], A. C., at pp. 623-4, discusses the intention of the rule and what the Court considers the effect of the words "whether any consequential relief is or could be claimed or not" in the rule. He says: "The power of the Court of Chancery to make declarations of right without giving consequential relief was introduced by the Chancery Procedure Act, 1852. That section did not contain the words in the

present rule 'whether any consequential relief is sought or not' and it was held by Kindersley, V.-C., in *Jackson v. Turner*, and Wood, V.-C., in *Rooke v. Lord Kensington*, that it only enabled the Court to make declarations of right in cases in which the plaintiff might have consequential relief if he chose to ask for it. The additional words were introduced in order to enlarge the power of the Court to make declarations in cases where from the nature or circumstances of the case no substantive relief could be given by the Court. An example of such a case may be found in the case of *London Association of Ship Owners and Brokers v. London and Niagara Docks Joint Committee* [1892], 3 Ch. 242; and a familiar instance is when a declaration is sought as to future or reversionary rights, though the Court is very slow to make a declaration in such a case."

Judgment.
MacMahon,
J.

Since the change in the Judicature Act, R. S. O. ch. 51, sec. 57, sub-sec. 4, and the County Courts Act, sec. 23, sub-sec. 11, there can I conceive be no doubt that where a cause is within the jurisdiction of the county court an injunction will, in a proper case, be granted to restrain an apprehended wrong, and also to make a declaration of right as part of the relief sought; or to make a declaration of right in a case where no substantive relief is sought. For by section 28 of the County Court Act, that court has legal and equitable jurisdiction to grant relief as regards all causes of action within its jurisdiction in as full and ample a manner as might be done in a like case in the High Court.

But is the present a proper case in which to grant an injunction? I think not. Even in those cases in which the court so frequently exercises its power by granting an injunction, namely, in cases of threatened or existing nuisance, it is necessary, before the court will interfere, to shew that irreparable or, at least, serious injury will occur, and it is seldom that an injunction will be granted where there is an adequate remedy in damages.

In Kerr on Injunctions (3rd ed.), 172, the author says :

Judgment. "The interference of the court by interlocutory injunction, being founded on the existence of the legal right, and having for its object the protection of property from irreparable injury pending the trial of the right, a man who comes to the court for an injunction to restrain a nuisance must be able to satisfy the court that he has a good *prima facie* title to the right which he asserts, and that there is danger of irreparable, or at least material, injury being done in the meantime, before the trial of the legal right can be had. If the damage is so slight that no injury has arisen or is likely to arise, or if the injury, if any has arisen, is adequately reparable by damages, or will be much more than compensated in point of convenience to those who are injured by it by the results which are to follow, the court will not entertain jurisdiction."

MacMahon,
J.

Where an injunction is to prevent the sale or dealing with a chattel, the same learned author says, at p. 595: "When the thing about to be sold is in the nature of a specific chattel, which cannot be the subject of compensation by damages, as where the defendant was about to sell diamonds to which the plaintiff claimed title, he was restrained by injunction: *Tonnins v. Prout* (1766), 1 Dick. 387. So also when a chattel necessary for conducting a particular business is in the possession of persons who claim a lien upon it, and threaten an immediate sale, the Court has jurisdiction to interfere by injunction and prevent irreparable injury to the debtor by giving him an opportunity of redeeming it: *North v. Great Northern R. W. Co.* (1860), 2 Giff. 64." Or "if a fiduciary relation exists between the parties, the right of a man who entrusts goods to another to be protected in the beneficial enjoyment of his property in specie is not confined to articles possessing any peculiar or intrinsic value * *. An agent accordingly was restrained from parting with the possession of furniture and household effects by which the plaintiff's title would be embarrassed": *Wood v. Rowcliffe* (1844), 3 Ha. 304.

It would be fruitless, as well as unnecessary, to attempt to refer to more than a few of the cases dealing with the

principles upon which courts of equity have interfered, or refused to interfere, by injunction, with the sale or other disposition of specific chattels. Judgment.
MacMahon,
J.

In *Falcke v. Gray* (1859), 4 Drew 651, at p. 657, Kindersley, V.-C., who was then dealing with the question of specific performance of an agreement for the sale of a chattel, puts this self-interrogation: "Upon what principle does the court decree specific performance of any contract whatever?" And he answers this by quoting from the judgment of Lord Redesdale in *Harnett v. Yeilding* (1805), 2 Sch. & Lef. 549, where he says, at p. 553: "Whether courts of equity in their determinations on this subject have always considered what was the original foundation for decrees of this nature, I very much doubt. I believe that, from something of habit, decrees of this kind have been carried to an extent which has tended to injustice. Unquestionably, the original foundation of these decrees was simply this, that damages at law would not give the party the compensation to which he was entitled; that is, would not put him in a situation as beneficial to him as if the agreement were specifically performed."

In *North v. The Great Northern R. W. Co.* (1860), 2 Giff. 64, the plaintiff was a colliery owner, and the sixty-four railway trucks which the defendants threatened to sell were held by Stuart, V.-C., to be "of special value to him, in order to carry on his business. The sudden sale of these wagons, without which the trade could not be conducted, must necessarily have inflicted serious injury by the interruption of his trade."

In *Flint v. Corby* (1853), 4 Gr. 45, it is said "that saw-logs cannot be intended *prima facie* to be of 'peculiar value' without any evidence that they are so. But they are more likely to be of peculiar value than most other descriptions of chattels, and specific relief may be given with respect to them in more instances than almost any other sort of chattel property."

Esten, V.-C., in refusing the motion for an injunction to

Judgment. restrain the defendants from appropriating the saw-logs cut
MacMahon, on Crown Lands, of which the plaintiff was licensee, to
J. their own use, and from sawing up the said saw-logs or any
of them, said, at p. 57: "None of the cases go the length of
saying that a personal contract will be enforced, or a
specific chattel be ordered to be delivered up, simply because
the plaintiff is entitled; but, as was said by Lord Kenyon
in *Errington v. Aynesley* (1788), 2 Br. C. C. 341, "specific
performance is only decreed where the party wants the thing
in specie and cannot have it any other way. It is only when
the legal remedy is inadequate that equity will interfere.
Now, does the plaintiff shew in this case that he wants
these logs in specie; that their value, if he obtained that,
would not be an adequate remedy? It is true that the
jury might not give him the full value of the logs, but a
risk of that nature is not what is meant by an 'inadequate
remedy' at law. If the value of the logs would be an
adequate remedy, as it would be unless the logs in specie
are needful, he has his full remedy at law."

In *Mason v. Norris* (1871), 18 Gr. 500, where the plaintiff
and one Luce were tenants in common of an oil well and
had filled a tank with oil, 1,600 barrels of which belonged
to the plaintiff and 800 to the defendant, and they had
agreed that the oil was not to be sold under \$5 per barrel,
they were not partners. Luce, without authority, con-
tracted for the sale of all the oil in the tank at \$1.25 a
barrel. Held, on a bill against the purchaser, that Luce
had no right to sell the plaintiff's portion of the oil, that
the defendant's removal of it would be wrongful; but that
as the oil was a staple commodity which had not any
peculiar value, and as there was no fiduciary relation be-
tween the plaintiff and Luce, the plaintiff was not entitled
to an injunction, and that his only remedy was an action
at law.

Mr. High, in his work on Injunctions, 3rd ed., sec. 122, in
discussing the right of the judgment debtor to enjoin the sale
of exempt personal property under execution, says: "Upon
principle, it is difficult to perceive any satisfactory reason

for interfering by injunction in such cases, since adequate relief may usually be had by an action at law." And in Pomeroy's Equity, vol. 1, sec. 177, the author says that the owner of a chattel having a complete remedy at law for its unlawful seizure or detention, equity will not entertain jurisdiction at his suit to recover possession of it, except where it has a certain special, extraordinary and unique value impossible to be compensated for by damages.

Judgment.
MacMahon,
J.

The above paragraphs are quoted in the opinion of the Court in *Parsons v. Hartman* (1894), 25 Oreg. Rep. 547, where it was held that "a suit by a judgment debtor will not lie to enjoin the sale of his personal property under execution, upon the ground that it is exempt by law from sale under judicial process, unless the property possesses a special value to the judgment debtor alone, * * the loss of which cannot be compensated in damages, since the judgment debtor has an adequate remedy in law for the unlawful seizure or detention except as to property possessing such special value."

What was the threatened injury of which the plaintiff complained in this case? He claimed ownership of a horse, the outside value of which was \$75. Even had the animal been taken from his possession by the defendants, no possible injury would have resulted for which a complete remedy would not have been had in damages; and the obtaining of an injunction and asking for a declaration of right under the circumstances disclosed here, instead of being "just and convenient," must prove vexatious and oppressive in the extreme. If this practice were allowed, it would result in injunctions being granted in the County Courts restraining bailiffs of the Division Court, where they had threatened to seize, say the execution debtor's cow, valued at \$25, from seizing or selling the same, on the ground that the animal formed part of the exemptions to which the debtor was entitled—a practice which would prove most pernicious.

No change has been made by the Judicature Act in the principle on which the Court grants injunctions: *Day v.*

Judgment. *Browning* (1878), 10 Ch. D. 294. Sir George Jessel, M.R.,
MacMahon, says, at p. 307: "It must be 'just,' as well as 'convenient.'"
J. See also *Fletcher v. Rodgers* (1898), 27 W. R. 97.

If the defendants, or either of them, took possession of and sold a horse which the plaintiff claimed as, and proved to be an exemption, an action would lie against them for its value.

In exercising the power to grant injunctions, a wide discretion is unquestionably given to courts of equity. But where a function is to be exercised "according to discretion," it means "according to the rules of reason and justice." (*Rooke's case* (1598), 3 Rep. 100 (a); *Keighley's case* (1609), 5 Rep. 140 (b)); and *per* Jessel, M.R. (in *Re Taylor* (1876), 4 Ch. D. 157, 160), "the discretion of the Judge is to be exercised on judicial grounds not capriciously, but for substantial reasons." And Lord Blackburn, in *Doherty v. Altman* (1878), 3 App. Cas. 728, says: "The jurisdiction of the court of equity to enforce the specific performance, or to grant an injunction to prevent the breach of a covenant, is, no doubt, a discretionary jurisdiction, but I perfectly agree with the view expressed by your Lordships, that the discretion is not one to be exercised according to the fancy of whoever is to exercise the jurisdiction of equity, but is a discretion to be exercised according to the rules which have been established by a long series of decisions and which are now settled to be the proper guide to Judges in courts of equity."

Of the numerous decisions I have examined, all are adverse to the granting of an injunction in a case such as we are now dealing with, and it certainly is not one where a declaration of right should have been made. So there can be but one conclusion, namely, that there was not a proper exercise of the discretionary power by the County Court Judge in granting the injunction.

The trial in this case was by a jury, and sec. 51, sub-sec. 5, of the County Courts Act, provides that where that is the case any motion for a new trial, whether made for that

relief alone, or combined with or as alternative for any other relief, shall be made to the County Court. But by section 54, on an appeal the Divisional Court may set aside any judgment which may have been directed to be entered or may have been signed, and direct any other judgment to be entered or direct a new trial to be had, and make any other order as to such Court may appear requisite and just.

Judgment.
MacMahon,
J.

The appeal will be allowed with costs, and the verdict and judgment in the Court below set aside with costs.

ROSE, J.:—

I agree to the conclusion reached by my learned brother, and especially to what he has said about the care to be exercised in granting injunctions in cases like the present, where adequate relief by the way of damages may be had.

MEREDITH, C.J.:—

I agree.

G. F. H.

[DIVISIONAL COURT.]

BUCHANAN V. INGERSOLL WATERWORKS COMPANY.

Water and Watercourses—Prescription—Riparian Rights—Artificial Channel.

About the end of the last century an artificial channel or water-race was built across a lot now owned by the plaintiffs for the purpose of carrying water from a stream above the plaintiffs' land to a mill below, the water being diverted into the channel by means of a dam. The channel and the banks on either side of it never formed part of the plaintiffs' land having been excepted therefrom so that their land was not contiguous to the water. The defendants diverted the water and the plaintiffs were thereby deprived of the use of the same for watering their cattle:—

Held, that the plaintiffs were not riparian proprietors and could not claim any right by prescription to the use of the water.

Decision of ROSE, J., reversed.

Statement.

THIS was an action tried before ROSE, J., at the non-jury Sittings, at Woodstock, on May 2nd, 1898.

The action was brought by the plaintiffs, Hiram Buchanan and his wife, against the defendant company, for damages arising from the diversion of a stream of water which ran across the plaintiffs' land whereby they were prevented from watering their cattle.

The plaintiffs alleged that the stream had been a running stream for all time and was fed by springs to the south of their land, the stream so running across their land to a pond called Choate's pond.

In 1894 an agreement was entered into under which pipes were laid across the plaintiffs' land for the carriage of the water to the mill, which the plaintiffs claimed diverted all the water out of the stream except what ran over the dam; and that, during the summer months there was no running water in the stream, the only water there being surface water after a fall of rain which ran into it, and that during the winter months, by reason of there being so little water, the stream was frozen solid.

The defendants contended that the plaintiffs had no title to the creek, but that the title was in the defendants; that

the plaintiffs had not had a continuous user of the water so as to give them any prescriptive title; and that in any event, under the agreement made in 1894 between the plaintiffs and the defendants, the defendants were entitled to the water for their waterworks purposes. Statement.

J. B. Jackson, for the plaintiffs.

T. Wells, for the defendants.

The facts so far as material, are set out in the judgments.

At the close of the case the learned Judge reserved his decision, and subsequently delivered the following judgment:

August 7, 1898. ROSE, J.:—

The date when the ditch or watercourse in question was constructed across the plaintiffs' land appears to me to be in doubt.

From the evidence of Elias Cook it was in existence for over forty years prior to the beginning of the action; and Thomas Choate, speaking of the fact as one of history, antedates it to about 1797.

A deed was put in from John Ingersoll to Jacob Choate, bearing date the 7th March, 1851, which appears to be a conveyance of the land occupied by the watercourse. And I find such parcel of land excepted from a subsequent conveyance of lot 28, the words being in a deed produced of the 24th July, 1876, from Box to Havens "excepting thereout half an acre more or less occupied as a water-race between the swamp and Choate's mill pond."

It may be that the fact is that early in the present century or at the close of the last century a mill-race was constructed over the land now owned by the plaintiffs, but that the title to such land was not acquired until 1851.

However that may be, I think from the nature of the watercourse and the purpose for which the water was

Judgment.

Rose, J.

used and the flow of the natural stream in another direction there is no reasonable doubt that this watercourse was constructed for the purpose of carrying water down to Choate's mill so as to give him water power.

The natural stream had a course westerly, and was diverted to its present direction by an embankment or dam constructed on property not owned by the plaintiffs, and lying above it, which property is I believe now owned by the defendant company.

If Thomas Choate's understanding of the fact is correct, that embankment or dam has been in existence for nearly a century. It certainly has been in existence for forty or fifty years.

If the water was diverted and carried across the plaintiffs' land for a temporary use or purpose, the plaintiffs must fail; if it was intended to be permanent the plaintiffs must succeed. For, assume it to be permanent, there is no doubt that the plaintiffs are riparian proprietors, although the title in the land covered by the water running through this farm is not in them, and as such proprietors are entitled to have the water continue in its course, and the defendant company has not the right, as it now claims, to divert the water so that it will not pass through the plaintiffs' land.

I have been in considerable doubt as to the proper finding of fact, but having regard to the time during which the water has been running its present course, the uses to which it has been put by the owners of the land through which it has run, the fact that during fifty or one hundred years it has been prevented from going in its natural course to the west, and that it has been maintained in its present channel finding its outlet in another stream, that those through whose land it passed have from time to time maintained the embankment by their own labour and at their own cost so as to supply their farms with water, the fact that the water is living water or a natural stream fed by springs would lead me to the conclusion that the diversion was intended to be permanent, although

no doubt the reason for diverting the stream was to supply Choate's mill with water power. I do not think that this alone should lead me to conclude that the purpose was a temporary one.

Judgment.

Rose, J.

If this conclusion of fact is correct the plaintiffs and others upon the present watercourse are entitled to have the water come down such course, and the defendant has no right to divert it or carry it by pipes or otherwise to its own property in such a manner as to prevent the use of it by the proprietors of the land through which it flows.

It is not necessary to determine what burthen is upon the defendant to maintain the embankment or dam so as to continue the waters in the present channel. I do not think any such burthen is imposed upon the defendant, and I think if the dam should break away from natural causes and the stream should take its original channel the plaintiffs could have no cause of complaint against the defendant. I think that the plaintiffs and others who now use the waters of such stream would have to maintain the dam at their own expense or take the consequence of its breaking away. By the diversion of the water those through whom the defendant claims, acquired no proprietorship in the water, they acquired the right to use it for the purpose for which they were using it, and any one of the public had a right to take such water for the usual and ordinary purposes if he had a right of access to it.

The fact that on some occasions the embankment or dam has broken away in whole or in part and that the stream has not come down the present watercourse but has gone in its natural direction does not make against the plaintiffs. Such was not an interruption of the plaintiffs' user or prescriptive right, and is a fact I think rather, against the defendant, for the plaintiffs or those through whom they claim, and the adjacent proprietors restored the embankment or dam for their own purposes and to continue the flow of the water in the present channel, and this without regard at all to the original purpose for which the water was brought down. This is one of the

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facts which lead my mind to conclude that the continuance of the water in its present channel was and is of a permanent nature.

It was urged upon me that the title to the land which formed the watercourse not being in the plaintiffs was an objection to their right to recover; but riparian rights are not dependant upon the ownership of the land covered by water, whether the title be in the person whose lands are contiguous or not makes no difference, nor does it make any difference whether the watercourse is a natural or artificial one. If the land was contiguous to the water, riparian rights would arise.

[The learned Judge then considered the question whether the agreement of 1894, between plaintiffs and defendant company, gave the latter the right to take all the waters of the stream as contended for by it, and came to the conclusion that it was not intended to take the surplus water down the pipe, placed under the agreement, and should be restrained from so doing, and continued :]

I have referred to many authorities in the consideration of this case. The plaintiffs relied upon *Magor v. Chadwick* (1840), 11 Ad. & E. 571; but that case must be confined to its facts: see *Greatrex v. Hayward* (1853), 8 Ex. 291; *Rameshur Pershad Narain Singh v. Koonj Behari Pattuk* (1878), 4 App. Cas. 121, especially at pp. 124-127. The plaintiffs also relied upon *Sutcliffe v. Booth* (1863), 32 L. J. N. S. Q. B. 136, and *Roberts v. Richards* (1886), 50 L. J. N. S. Ch. 297; Goddard on Easements, 5th ed. 313, 325, 340, 341; Angell on Watercourses, 7th ed., pp. 205, 206 and 208. I think that the plaintiffs are entitled to their costs.

I do not deem it material to consider in which plaintiff the title to the land is. It is a matter of no consequence to the defendant company. In complying with the order it will be for the benefit of either or both of the plaintiffs in whomever the title may be.

From this judgment the defendants appealed to a Divisional Court composed of ARMOUR, C.J., and STREET, J.

February 13, 1899. *Aylesworth*, Q.C., supported the appeal. The plaintiff failed to shew any title to the land comprising the race way. The conveyance from Ingersoll to Jacob Choate conveyed the half an acre which comprises the race way, and Jacob Choate conveyed that half acre to Thomas Choate and it was excepted from the grant of the plaintiffs' lot. The plaintiffs cannot shew a title by prescription to the water: *Mason v. Shrewsbury and Hereford R. W. Co.* (1871), L. R. 6 Q.B. 578; but in any event the evidence shews that the plaintiffs' user of the water was not a continuous user. Then, under the agreement of 1894, power is expressly given to the defendants to lay down their pipes, and to take all the water required for the purpose of the waterworks without any reservation whatever, and the defendants have only used the water for such purposes.

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Wallace Nesbitt, contra. Prior to the deed from Ingersoll to Jacob Choate, Ingersoll had conveyed away the land through which this stream ran, merely reserving an easement for the flow of water; and, therefore, when he attempted to convey the half acre to Jacob Choate he had no right or power to do so, and only an easement passed to the defendants. The plaintiffs can clearly claim a right by prescription, the existence of the right for twenty years would give such title, while the watercourse has been in existence since 1797. The plaintiffs' user has been continuous, the fact of a cession of the flow for a short time, when the dam got out of repair, but which was immediately repaired, cannot be held to be such a break in the user as to stop the running of the statute: *Beer v. Stroud* (1887), 19 O. R. 10, 14. The agreement of 1894 in no way affected the plaintiffs' rights. The grant of a partial change of the user of the water did not take away the plaintiffs' whole right to the water: *Rameshur Pershad Narain Singh v. Koonj Behari Pattuk* (1878), 4 App. Cas. 121; *Goddard on Easements*, 5th ed., 75; *Elliott v. Baird* (1879), 26 Gr. 549; *Roberts v. Richards* (1881), 50 L. J. N. S. Ch. 297.

Judgment. February 27th, 1899. The judgment of the Court was
Armour, C.J. delivered by

ARMOUR, C. J. :—

Some time, it was said near the end of the last century, one Choate built a grist mill upon a part of lot 27 in the broken front concession of the township of West Oxford, and there being a swamp with springs in it upon lots 25 and 26 in the first concession of the said township the water from which flowed in a natural channel through lots 27, 28 and 29 in the same concession and thence in a westerly direction, Choate at a point upon such natural channel and on lot 28 in the first concession, diverted the water from the natural channel and brought it by means of an artificial channel through lot 28 in the broken front concession and through part of lot 27 in the broken front concession to a pond from which he used the water so brought for the purpose of running his mill, and at the point at which he diverted the water from its natural channel he built a dam upon the natural channel to force the water from the natural channel into the artificial channel.

It appeared that on the 7th March, 1851, by indenture of that date made between one John Ingersoll therein described as the oldest son and heir-at-law of Thomas Ingersoll of the first part, and Jacob Choate of the second part, the said John Ingersoll granted to the said Jacob Choate in fee "all and singular that certain parcel or tract of land and premises situate, lying and being in the township of West Oxford, containing by admeasurement half an acre of land, be the same more or less, situate on lot 28 in the broken front concession of West Oxford, on which a certain ^vmill-race has been arranged for the free water passage from the cedar swamp to the mill pond of the said Jacob Choate the same having been released in the mortgage given William H. Merritt by my late father."

It appeared that the plaintiffs claimed title to their ^{Judgment.} land, being part of said lot 28 in the broken front con- ^{Armour, C.J.} cession, under one Francis Lord Box, who conveyed the same, on the 24th July, 1876, to Aaron L. Havens, who conveyed the same on the 1st day of May, 1878, to Elias Cook, who conveyed the same, on the 27th October, 1888, to Eli L. Cook, who conveyed the same, on the 27th day of October, 1893, to the plaintiff Hiram Buchanan, who conveyed the same, on the 6th day of March, 1897, to the plaintiff Della H. Buchanan.

In the conveyance from Box to Havens the land is conveyed "excepting thereout half an acre, more or less, occupied as a water race between the swamp and Choate's mill pond."

And in the conveyance from Havens to Elias Cook, the land is conveyed "excepting thereout half an acre, more or less, occupied as a water-race between the swamp and Choate's mill pond."

Neither in the conveyance from Elias Cook to Eli L. Cook, nor in the conveyance from Eli L. Cook to the plaintiff Hiram Buchanan, does this exception appear; but in the conveyance from the plaintiff Hiram Buchanan to the plaintiff Della H. Buchanan, the land is conveyed "excepting thereout the waterworks ditch."

It appeared that the defendants claimed title to their land which comprised the land, part of lot 27 in the broken front concession, on which was the site of the said grist mill and mill pond, from one Thomas Choate to whom, and to the said Jacob Choate and to one John McCarty Choate, it had been devised by one Thomas Choate, the elder, as tenants in common, the said Thomas Choate, the younger, having acquired the title of the said Jacob Choate and John McCarty Choate by conveyances, each of which contained a conveyance of all the right, title and interest of the grantor to the water across lot 28 in the broken front concession.

The said Thomas Choate, the younger, on the 27th December, 1879, conveyed the said land to Edmund

Judgment. Jarvis, who conveyed the same on the 25th May, 1880, to Armour, C. J. James Gustin, who conveyed the same to M. T. Buchanan on the 24th September, 1890, who conveyed the same on the 27th September, 1890, to the defendants; and each of the said conveyances conveyed the said land "together with the right and privilege of conducting the water on and across lot number 28 in said first and broken front concession as at present enjoyed."

It is plain that neither of the plaintiffs ever acquired any title to the "half acre more or less occupied as a water-race between the swamp and Choate's mill pond," and excepted from the land conveyed by Box, under whom they claimed, to Havens.

The plaintiffs claimed the right to the flow of the water in this mill-race, alleging that they were riparian proprietors and as such were entitled to such right.

In order to shew that they were riparian proprietors it was necessary for them to shew that their land was washed by the waters of the mill-race, and that their land was in contact with the flow of the water of the mill-race: *Lyons v. Fishmongers Co.* (1876), 1 App. Cas. 662, at p. 683.

The burden was upon them to shew it and in my opinion they failed to do so. The reasonable inference is that the land "occupied as a water-race" included not only the *alveus*, but also the *ripa*,—the bed of the race and also the bank, without which the water could not have been contained in the race.

The water in the race, therefore, flowed not through the plaintiffs' land, but through land to which they had no title and the title to which was in others, and they had not, therefore, any right to the flow of it as riparian proprietors, nor had they acquired any prescriptive right to the flow of it.

[The learned Chief Justice then considered the right of the defendants under the agreement mentioned to take all the water, if they so desired, and was of the opinion that they had the right, and continued :]

The appeal must therefore be allowed with costs, and the action dismissed with costs.

[DIVISIONAL COURT.]

ZIMMERMAN V. KEMP.

Principal and Surety—Judgment against Principal—Proof Required against Surety and Third Party—Administration Bond.

The plaintiff having an unsatisfied judgment against the administratrix of an estate, procured an assignment of the administration bond and brought an action thereon against the sureties, when a person, who had indemnified the sureties was made a third party under an order whereby the question of the indemnity was to be tried after the trial of the action, as the Judge might direct, with the liberty to appear by counsel and defend the action and to call and cross-examine witnesses, and it was also ordered that he should not thereafter be at liberty to dispute the defendant's liability, if any, to the plaintiff. At the trial the judgment was put in and one of the defendants called as a witness, who stated that the amount of the judgment was correct. It was objected on behalf of the third party that the liability had not been properly proven as against him, and there should be a reference to ascertain and determine the defendant's liability which was refused and judgment entered for the plaintiff:—

Held, that the judgment so recovered was not sufficient to bind the third party, and a new trial was directed.

THIS was an action tried before ARMOUR, C.J., without Statement. a jury, at St. Catharines, on the 20th May, 1898.

The action was brought on an administration bond against John C. Kemp, the surviving surety, and Thomas A. Kemp and George A. Zimmerman, executors of Robert Kemp, deceased, the other surety to the bond, to recover the amount for which they were liable under its terms.

On the application of Thomas A. Kemp and George A. Zimmerman, Milton Ernest Wilcox was made a third party.

The facts and evidence, so far as material, are set out in the judgment of the Divisional Court. It was objected, on behalf of the third party, that there was no such evidence given as justified judgment being entered against him.

Statement. The Chief Justice over ruled the objection, and entered judgment for the plaintiff against the defendants, and in favour of the defendants over against the third party.

From this judgment the third party appealed to the Divisional Court.

On January 17th, 1899, before a Divisional Court composed of MEREDITH, C.J., ROSE, and MACMAHON, JJ., *Aylesworth*, Q.C., supported the appeal on behalf of the third party. There was not sufficient evidence given at the trial to render the third party liable. To make him liable as a surety the account should have been gone into and he should have had the right to cross-examine the witnesses as to the truth of the statements made: *Allan v. McTavish* (1881), 28 Gr. 539, 545; (1883), 2 A. R. 440; *King v. Norman* (1847), 4 C. B. 884. The Master's report also finds the defendants liable both as administrators and as guardians, while the bonds were only given for the acts of the administrators.

H. H. Collier, for the defendants. The defendants' position is that, as between the defendants and the third party, the matter is *res judicata*. The third party was made a party by an order of the Court, by which he was to be bound by the judgment recovered, and he should have had some provision put in the order if he required stricter proof than would be required as against the defendants. He knew what the action was for and how it would be proved. The evidence of the defendant who gave evidence, shewed that he knew all about the claim, and admitted it to be correct.

Middleton, for the plaintiff. The plaintiff's judgment was properly recovered against the defendants, and they are the only parties he had to deal with. The defendant has admitted the plaintiff's claim against him, and the plaintiff is not concerned with the defendants' right to recover over against the third party. The judgment should therefore stand as against the defendants.

Aylesworth, in reply. The provision in the order, **Argument.** making the third party a party to the action that he was to be bound by the judgment, means by a judgment properly recovered, and does not mean a judgment recovered in a manner different from what it would have been if the third party had been a defendant to the action, in which case the claim would have to have been properly proved against him: *Ex p. Young, In re Kitchin* (1881), 17 Ch. D. 668.

February 21st, 1899. The judgment of the Court was delivered by

MEREDITH, C.J.:—

The third party appeals from the judgment pronounced at the trial at St. Catharines, on the 30th May, 1898, by the learned Chief Justice of the Queen's Bench, in favour of the plaintiff against the defendants for \$4,000, and for the defendants against the third party for the like sum.

Rebecca Ellen Patterson was appointed by the surrogate court of the county of Lincoln administratrix of the personal estate of her deceased husband, Alexander Patterson, and the defendant John C. Kemp and the deceased Robert Kemp gave the usual administration bond as her sureties (being bound in the penal sum of \$4,000), on the 12th April, 1877. Rebecca Ellen Patterson was also appointed by the same Court guardian of the personal estate of the infant daughter (the now plaintiff) of the deceased Alexander Patterson, but the Kemps did not become sureties for the performance of her duties as guardian.

Rebecca Ellen Patterson subsequently became the wife of the third party, Milton Ernest Wilcox, who, on the 16th June, 1883, became bound to John C. Kemp and Robert Kemp, the sureties for the administratrix, in the sum of \$6,000, conditioned that the bond should become void if Rebecca Ellen Wilcox should, as administratrix of the personal estate of Alexander Patterson, deceased, render a proper and true account of her administration, and should duly

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C.J.

pay over and account for all moneys which should come into her hands as administratrix of the said estate, and should, whenever required so to do by the proper authority, render a proper account of the said estate, and should in all respects comply with the rules and regulations of the surrogate court of the county of Lincoln, or with the rules and regulations of any other court having jurisdiction over the said estate, and should indemnify and save harmless the said John C. Kemp and Robert Kemp, or either of them or their or either of their heirs, executors and administrators of and from any loss which they might sustain as sureties for the said Rebecca Ellen Wilcox, and of and from any costs in connection with the said estate.

An action was brought by the now plaintiff against Rebecca Ellen Wilcox as administratrix of the personal estate and effects of Alexander Patterson, deceased, and guardian of the person and property of the plaintiff (*Zimmerman v. Wilcox*), the result of which was that by a judgment pronounced on further directions on the 8th day of July, 1897, it was ordered and adjudged that Rebecca Ellen Wilcox should pay to the plaintiff \$7,762.81, in which sum Rebecca Ellen Wilcox was found to be indebted on the taking of her accounts of her dealings with the estate of the deceased Alexander Patterson, in her capacity of administratrix and that also of guardian.

The plaintiff, being unable to realize the amount payable to her by the judgment, applied to the surrogate court for and obtained an assignment of the administration bond, and thereupon brought this action against John C. Kemp, the surviving surety, and Thomas A. Kemp and George A. Zimmerman, the executors of Robert Kemp, the deceased surety in the administration bond, to recover the amount for which they were liable under its terms.

Milton Ernest Wilcox was added as a third party on the application of the defendants Thomas A. Kemp and George A. Zimmerman, who claimed to be indemnified by him against whatever should be recovered against them in this action.

By an order made on the 20th May, 1898, it was directed that the question of indemnity between the defendants and the third party should be reserved to be tried after the trial of the action as the Judge presiding at the trial might direct, and that Wilcox should be at liberty to appear by counsel and defend the action as regards the questions between the plaintiff and defendants, and call witnesses and cross-examine witnesses called by the plaintiff and defendants. And it was further ordered that Wilcox should not be at liberty thereafter to dispute the liability of the defendants to the plaintiff, if any, in the action as might ultimately be determined by the judgment of the court in the action, or the validity of the judgment.

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C.J.

The action came on for trial before the Chief Justice of the Queen's Bench, at St. Catharines, the plaintiff, the defendants and the third party being represented by counsel.

The plaintiff put in the judgment in the action of *Zimmerman v. Wilcox*, a certified copy of the Master's report in that action, and some other documentary evidence which it is not necessary to refer to, and called as a witness the defendant Thomas A. Kemp, who had been the next friend of the plaintiff in the action of *Zimmerman v. Wilcox*.

I extract the following passages from the evidence of the defendant Thomas A. Kemp:—

To plaintiff's counsel: "Q. You know judgment was recovered? A. Yes. Q. Do you admit that that is correct? A. Well, as far as I know." On cross-examination: "Q. Do you know what he (that is, the Master) reported? A. Yes, I saw his report. I have read it. Q. Have you any knowledge of it more than from reading it over? A. Oh, I have a little knowledge of the thing. Q. How do you come to say it is correct? Have you personal knowledge of all the items that go to make up the result that he came to? A. The most of them. Q. But not all? A. Well, I don't know but what I would be safe in saying all."

* * * * *

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“Q. But you know there was a very great number of items? A. But I went over principally the whole of them. I figured this estate before it went into the Master’s office, in order to get a settlement, and I made the whole estate worth \$14,000 some hundred dollars, and I looked over the Master’s account to see where we differed; the Master made it a little bit more, some \$15,000, pretty near.”

With this evidence the plaintiff closed her case. It was then objected by counsel for the defendants and for the third party, as it had been when the judgment was offered to be put in evidence, that the judgment was not evidence against them as to the amount of the liability of Rebecca Ellen Wilcox for which the sureties to the administration bond were answerable, and that the evidence of Thomas A. Kemp was not sufficient to establish the liability, and they asked for a reference for the purpose of ascertaining and determining the amount which the plaintiff was entitled to recover on the administration bond. The learned Chief Justice ruled against their contention and refused the reference unless at the expense of the third party, holding that the judgment was evidence against the sureties and that, at all events, with the evidence of Thomas A. Kemp there was proof sufficient to entitle the plaintiff to judgment against the defendants for the \$4,000, to which sum their liability was, as I have said, limited by the administration bond, and gave the judgment from which the third party now appeals.

It appears to be well settled that in the absence of special arrangement a judgment or award against the principal debtor is not binding on the surety, and is not evidence against him in an action in which he is sued by the creditor, the judgment being as to the surety *res inter alios acta*: DeColyar on Guarantees, 3rd ed., pp. 207-225, 295; *Ex p. Young, In re Kitchin* (1881), 17 Ch. D. 668; *Douglass v. Howland* (1840), 24 Wendell 35.

This rule of law is founded on the application of the maxim *res inter alios acta alteri nocere non debet*, the principle and operation of which are discussed in Broom’s

Legal Maxims, 6th ed., p. 908, *et seq.*, where the leading case (the *Duchess of Kingston's* case (1776), 1 Sm. L. C., 10th ed., 713) and the other cases in which the maxim was applied are referred to and discussed.

The case of *King v. Norman* (1847), 4 C. B. 884, is an instance of the application of the rule in a case of principal and surety. In that case the action was one of debt on a bond entered into jointly and severally by the defendant and one David Strachan with the plaintiff, which recited that Strachan had been appointed a collector of certain taxes and that the plaintiff had consented to become one of his sureties for the due payment to the Receiver General of taxes of all such sums as should come into the hands of Strachan as collector, and for the due demand by Strachan of the several sums assessed of the persons from whom the same were payable and, in case of non-payment, for the due enforcement of the powers of certain Acts against such as should make default, and that the plaintiff had consented to become surety on condition that the obligors should enter into the bond, the condition of which was that the obligors should keep harmless and indemnify the plaintiff against all loss, costs, charges, etc., which he should incur in consequence of his becoming surety. At the trial no evidence was given of the actual receipt of any money by Strachan as collector, but it was admitted that he had not paid any money to the Receiver General, and it was proved that the plaintiff as his surety had been called upon to pay £500 claimed by the commissioners; and that being sued, the plaintiff submitted to judgment for that sum, which was signed against him under a Judge's order. Mr. Justice Williams, before whom the trial took place, was of opinion that the receipt by Strachan of £500 was admitted on the record, and the damages were accordingly assessed at that sum. On a motion by the defendant for a new trial, it was argued by the plaintiff's counsel that even if the receipt of £500 by Strachan as collector was not admitted on the pleadings, the production of the judgment against the plaintiff

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was sufficient evidence that he had been compelled by the Receiver General to pay the £500, but it was determined otherwise and a new trial was ordered. Mr. Justice Coltman, in delivering the judgment of the Court, said: "The judgment was evidence in this case that the plaintiff had been sued and coupled with proof, or (as in this case) an admission of his liability to some extent, might lead the jury to conclude that the plaintiff had been subjected to a *bonâ fide* pressure by which he was forced and obliged to pay whatever he was legally liable to pay through Strachan. But whether he was legally liable to the extent for which the judgment was signed is a matter which could only be collected by inference from the judgment, and for such a purpose the judgment could not be used without holding that a stranger to a judgment, who has had no opportunity to cross-examine the witnesses or to dispute the conclusions drawn from the evidence, can be barred by the verdict where the judgment is after verdict, or can be bound by an agreement made without his privity or intervention between the parties to the judgment where, as in the present case, it is a judgment founded on agreement. The law we apprehend is not so. The judgment cannot be used for such a purpose against one who is neither a party nor privy to it."

There is nothing, in my opinion, in the nature of the obligation of a surety in such an administration bond as is sued on to take the case out of the general rule.

A different view seems to obtain in some of the United States of America. In some States it is held that a judgment against the administrator is conclusive, in others that it is *primâ facie* evidence only against the surety: see Brandt on Suretyship, 2nd ed., pars. 638-9. An examination of the cases cited in support of the text shews that in some of them the decision was based on the fact that the surety had a right to appear and be heard on the taking of the accounts, and to appeal in the same way as the administrator might have done; in others the language of the bond sued on differed widely from that of the bond of

the defendants in this case. In the New York cases the sureties had become bound that the administrator would obey all orders of the surrogate touching the administration of the estate committed to him, and the breach assigned was failure by the administrator to obey an order of the surrogate for payment to the plaintiff: *Baggott v. Boulger* (1853), 2 Duer 160; *The People ex rel Demarest v. Laws* (1856), 3 Abbott's Prac. Rep. 450; in others that the decisions proceeded upon the statute law of the State, as in North Carolina, where, since 1844, the matter is regulated by statute. Prior to the legislation of 1844 the law was settled the other way: see *McKellar v. Bowell* (1825), 4 Hawks 34 (the case of a guardian's bond), where, after a review of the authorities up to that time, it was decided by the Supreme Court of the State that the record of a recovery against the guardian was not evidence against the surety in an action by the plaintiff in that recovery against the surety to "subject" him upon the guardian bond for the default of the principal.

Whether or not the American cases are all distinguishable, they form no warrant for our departing from the rule established by the English cases to which I have referred, which was followed and applied in *Allan v. McTavish* (1881), 28 Gr. 539, and by the present Chief Justice of Ontario, in the same case (1883), 2 A. R. 440.

What was said by Thomas A. Kemp in his examination as a witness was, no doubt, some evidence of the liability of Rebecca Ellen Wilcox for the amount which she was ordered to pay by the judgment, but having regard to the vague nature of the statements by the witness as to this, the proof was by no means satisfactory for the purpose of fixing liability on the third party; and were this the only ground relied on, I should hesitate to allow a judgment for so large a sum obtained on such evidence to stand. But there is a fact which does not appear to have been brought to the attention of the learned Chief Justice which is, I think, conclusive against the right of the plaintiff to hold the judgment which she has obtained, and it is this:

Judgment.

Meredith,
C.J.

Judgment. The amount for which the judgment against Rebecca Ellen Meredith, Wilcox was recovered includes not only the sum for which she was held liable as administratrix, but also that for which she was accountable as guardian, for which latter sum the defendants are in no way liable; and there is nothing appearing in the evidence by means of which it can be ascertained what sum is attributable to each head of liability, and it follows no evidence upon which the amount of the defendant's liability could at the trial or can now be determined.

The appeal must therefore be allowed, and the judgments appealed from set aside and a new trial had between the parties.

It would be manifestly to the interest of all parties that the amount of the defendant's liability should be determined on a reference, and the parties will, no doubt, be able to agree to such a reference being directed; but if they are unable to agree to that course being taken, the action must take its ordinary course, leaving it to the Judge before whom it comes on for trial to direct such a reference if he deems it proper to do so, or to any of the parties, if so advised to move before the trial for such a reference.

The costs of the appeal and of the last trial will be costs in the cause to the respective parties, unless the Judge at the trial, or the Judge who ultimately disposes of the question of costs, otherwise directs.

G. F. H.

DIVISIONAL COURT.]

TAYLOR V. SCOTT.

Habeas Corpus—Issue by Judge of High Court—Non-appeal from Judgment—Res Judicata.

A person confined or restrained of his liberty is now limited to only one writ of *habeas corpus* to be granted by a Judge of the High Court, returnable before himself or before a Judge in Chambers, or before a Divisional Court, with a right of appeal to the Court of Appeal, whose judgment is final; and where no such appeal is taken, the judgment which might have been appealed against becomes final and conclusive, and may be pleaded as *res judicata*.

Judgment of MACMAHON, J., affirmed.

THIS was an action heard on the 7th day of October, 1898, at the non-jury sittings, Toronto, by MACMAHON, J., who, subsequently delivered the following judgment, in which the facts, so far as material, are set out. Statement.

W. M. Boulton, for the plaintiff.

J. E. Jones, for the defendant.

October 27, 1898. MACMAHON, J.:—

The action is brought for the recovery of the possession of Lillie Taylor, a daughter of the plaintiff, now about seven years old, who was adopted by the defendant by articles of adoption between the plaintiff and the defendant, bearing date the 20th August, 1892, which recite that the plaintiff is the parent and guardian of the said infant, and is not possessed of the means to rear, clothe, and educate her, and for the considerations in the said indenture expressed, was given by the plaintiff to the defendant for adoption by him. The defendant covenants to train, clothe, and educate the said infant in a manner becoming his station in life, and as a good and faithful parent ought to do, and to all intents and purposes as if the said infant were his own child.

The statement of claim alleges that at the time of the execution of the agreement, from illness the plain-

Judgment. tiff's mind had become deranged, and that while in that
MacMahon, condition, and unable to understand and appreciate the
J. nature and effects of her acts, she executed the agreement.
There is also an allegation that she was improperly and
fraudulently forced by the defendant, and without having
the assistance of a solicitor, or of any person who could
advise her, as to the nature and effect of the document she
was signing, to sign the same.

The plaintiff by her prayer asks: (1) That the said agree-
ment be set aside, and that it be declared that it is not
binding upon her, and is of no force and effect as against
her and her right to the custody and possession of her
child, Lillie Taylor; and (2) a declaration that the plaintiff
is entitled to the custody and possession of her said
daughter.

The defendant, in his statement of defence, says that the
plaintiff ought not to be admitted to say that the agree-
ment is not binding upon her, and should be set aside for the
reasons set out in the statement of claim, because, before the
commencement of this action, and on the 8th October, 1897,
the defendant obtained an order for a writ of *habeas*
corpus requiring the plaintiff to bring up the body of the
said Lillie Taylor; and on the 29th October, in obedience
to the said writ, the plaintiff produced the said child
before the Honourable Mr. Justice Ferguson, then presid-
ing in Chambers, and the plaintiff then alleged the illegal-
ity of the said agreement upon the same grounds as those
alleged in the statement of claim herein, and there-
upon Mr. Justice Ferguson heard the evidence adduced on
behalf of both parties, and made the following finding:
“So far as the execution of the document is concerned, I
am of opinion that it has been shewn that it was properly
executed. No advantage was taken of Mrs. Taylor in
this regard. I cannot at all ignore the document on any
ground of fraud or of undue influence, and I think it
appears that Mrs. Taylor fully understood what she was
doing. As to professional advice, both parties went to and
consulted the same solicitor. I think that it is shewn

that the indenture is a well executed one, and I am of the opinion that it is an indenture sufficient under the statute. It is, I think, binding on the parties;" and he ordered the plaintiff herein, to hand over to the defendant herein the body of the said Lillie Taylor, and release to him all custody and control thereof: that the said order of the Honourable Mr. Justice Ferguson still remains in force, and the questions at issue in the said former proceedings and in this action are the same.

Judgment.
MacMahon,
J.

It was admitted that the defence was as appeared in the pleadings, and that Mr. Justice Ferguson did read the affidavits at the hearing of the motion on the *habeas corpus* proceedings, and did deal with the question of insanity and undue influence set up in the present action.

The plea of *res judicata* is in the nature of a demurrer to the statement of claim, and no evidence could therefore be adduced by the defendant, but certain admissions were made which it was considered would render it unnecessary for me to examine the notes made by Mr. Justice Ferguson in the *habeas corpus* proceedings.

In *Houstoun v. Marquis of Sligo* (1885), 29 Ch. D. 448, it was held that in order to raise the defence of *res judicata* it is not necessary to set forth in detail in the defence the pleadings in the other action, the judgment in which is said to operate as *res judicata*; but in order to judge whether the same questions were at issue in the first case as in the second case, the Court will look at the pleadings in the first action though they were not set out in the defence in the second action.

For fear that the admission made might not be considered wide enough, I read the affidavits filed on the *habeas corpus* motion, and find that the question of the mental capacity of the plaintiff, and her ability to understand and appreciate the nature and effect of her act when executing the agreement, and also that relating to the alleged fraudulent procurement by the defendant of the execution of the agreement and the absence of professional advice were all raised therein, and from the notes of

Judgment. judgment made by Mr. Justice Ferguson when disposing
MacMahon, of the motion, all these questions raised by the statement
J. of claim in the present action were considered and disposed of by him adversely to the plaintiff.

The matters decided by Ferguson, J., were those upon which the plaintiff had to rely in order to retain possession of her daughter Lillie; and when such matters are decided, as they were, by a Court of competent jurisdiction, the judgment is conclusive as between the same parties: *Priestman v. Thomas* (1884), 9 P. D. 70, 210; *Flitters v. Alfrey* (1874), L. R. 10 C. P. 29; *Ballantyne v. Mackinnon* (1896), 2 Q. B. D. 455, at p. 462; *Radford v. Merchants Bank* (1883), 3 O. R. 529.

What is sought by the present action is virtually a reversal of the judgment of Ferguson, J., in the *habeas corpus* proceedings. The cause of action set up in the statement of claim being *res judicata*, the defendant is entitled to judgment with costs of suit.

On the 17th February, 1899, *Boulton*, moved by way of appeal from this judgment before a Divisional Court, composed of ARMOUR, C.J., and STREET, J.

J. E. Jones, shewed cause.

February 17th, 1899. The judgment of the Court was delivered by

ARMOUR, C.J. :—

Had it not been for the right given to a person confined or restrained of his liberty, by R. S. O. ch. 83, sec. 6, to appeal to the Court of Appeal from the decision of a Judge before whom he had been brought by *habeas corpus*, remanding him, it would have been difficult to uphold this judgment, as in that case the judgment of Ferguson, J., would not have been conclusive, having regard to the law that the decision of any Court or Judge requiring to discharge such a person upon *habeas corpus*

is not binding upon any other Court or Judge before Judgment. whom said person may be again brought upon *habeas* Armour, C.J. *corpus*.

In *Rex v. Suddis* (1801), 1 East 306, Lord Kenyon, C. J., said, at p. 314: "I feel no difficulty in delivering the opinion which I entertain; because the prisoner will not be concluded by it, but may if he be dissatisfied apply to the other Courts of Westminster Hall."

The Canadian prisoners were brought by *habeas corpus* before the Court of Queen's Bench: *Leonard Watson's Case* (1839), 9 A. & E. 731; *Regina v. Batcheldor* (1839), 1 P. & D. 516; and subsequently by another writ of *habeas corpus* before the Court of Exchequer: *In the matter of Parker* (1839), 5 M. & W. 32.

In *Ex p. Partington*, the prisoner was brought first by *habeas corpus* before the Court of Queen's Bench (1844), 6 Q. B. 649, and was next brought by *habeas corpus* before the Lord Chief Baron in Chambers, and was then brought by *habeas corpus* before the Court of Exchequer (1845), 13 M. & W. 679.

In the latter case, Parke, B., delivering the judgment of the Court said, at p. 683: "This case has already been before the Court of Queen's Bench, on the return of a *habeas corpus*, and before my Lord Chief Baron at Chambers, on a subsequent application for a similar writ. In both instances the discharge was refused. The defendant, however, has a right to the opinion of every Court as to the propriety of his imprisonment, and therefore we have thought it proper to examine attentively the provisions of the statute, without considering ourselves as concluded by these decisions."

In *Re Murdock* (1882), 9 P. R. 132, Osler, J., said: "Whether my decision is in favour of the father or of the mother * * I reflect with satisfaction that the nature of the application is such that on another occasion, or before another Judge, or under altered circumstances, the matter may be reconsidered free from any embarrassment arising from the present decision."

Judgment. In *Cox v. Hakes* (1890), 15 App. Cas. 506, Lord Halsbury, Armour, C.J. L.C., said, at p. 514: "For a period extending as far back as our legal history, the writ of *habeas corpus* has been regarded as one of the most important safeguards of the liberty of the subject. If upon the return to that writ it was adjudged that no legal ground was made to appear justifying detention, the consequence was immediate release from custody. If release was refused, a person detained might—see *Ex p. Partington* (1845), 13 M. & W. 679—make a fresh application to every Judge or every court in turn, and each court or Judge was bound to consider the question independently, and not to be influenced by the previous decisions refusing the discharge. If discharge followed, the legality of that discharge could never be brought in question. No writ of error or demurrer was allowed:—*City of London's Case* (1609), 8 Rep. 121b;" and Lord Herschell said, at p. 527: "The law of this country has been very jealous of any infringement of personal liberty, and a great safeguard against it has been provided by the manner in which the courts have exercised their jurisdiction to discharge under a writ of *habeas corpus* those detained unlawfully in custody. It will be convenient before proceeding to an examination of the section of the Judicature Act upon which this case turns, to state briefly the mode in which the courts have administered the law in relation to that writ. It was always open to an applicant for it, if defeated in one court, at once to renew his application to another. No court was bound by the view taken by any other, or felt itself obliged to follow the law laid down by it. Each court exercised its independent judgment upon the case, and determined for itself whether the return to the writ established that the detention of the applicant was in accordance with the law. A person detained in custody might thus proceed from court to court until he obtained his liberty. And if he could succeed in convincing anyone of the tribunals competent to issue the writ, that he was entitled to be discharged, his right to his liberty could not

afterwards be called in question. There was no power in ^{Judgment.} any court to review or contest the proceedings of the ^{Armour, C.J.} tribunal which discharged him. I need not dwell upon the security which was thus afforded against any unlawful imprisonment. It is sufficient to say that no person could be detained in custody if any one of the tribunals having power to issue the writ of *habeas corpus* was of opinion that the custody was unlawful."

From these cases it is apparent that but for the right to appeal so given, the judgment of Ferguson, J., upon the *habeas corpus* was not conclusive as against any other application that might thereafter have been made by *habeas corpus* by the plaintiff to get her child out of the custody of the defendant, and consequently could not have been pleaded as a *res judicata* in bar of this action.

The statute R. S. O. ch. 83, by section 6 of which the right to appeal is given, was originally the statute 29 & 30 Vict. ch. 45, and was intended to introduce in great part the provisions of the Imperial Act 56 Geo. III. ch. 100 into this country, but there was no right to appeal given by the Imperial Act.

By section 6 of 29 & 30 Vict. ch. 45, the right of appeal was given to a person confined or restrained of his liberty to the Court of Error and Appeal, which at that time consisted of all the Judges of the Queen's Bench, Common Pleas and Chancery, when such person had been brought before the Court in term time upon a writ of *habeas corpus* and had been remanded.

In R. S. O. (1887) ch. 70, the section appears as it now appears in R. S. O. (1897) ch. 83, giving the right of appeal to a person confined or restrained of his liberty to the Court of Appeal when such person had been brought before the court or Judge upon a writ of *habeas corpus* and remanded, the extension of the right to appeal from the decision of the court in term time to the decision of the Court or Judge having been made, as it is said, in deference to the judgment of Patterson, J. A., in *Re Hall* (1883), 8 A. R. 135, at p. 147.

Judgment. That case was decided upon section 6 as it stood in *Armour*, C.J. 29 & 30 Vict. ch. 45, and appearing in R. S. O. (1877) ch. 70, as section 9, limiting the appeal in express terms to the decision of the Court in term time *Re Boucher* (1879), 4 A. R. 191.

If the effect of that decision was what I take it to have been where the appeal was limited to the decision of the Court in term time, it is an *a fortiori* case where the appeal was extended to the decision of the Court or Judge.

And the effect of that decision I take to be that a person confined or restrained of his liberty is limited to one *habeas corpus* only to be granted by any Judge of the High Court returnable before himself or before the Judge in Chambers for the time being, or before a Divisional Court, and from the judgment given upon the return of this *habeas corpus* remanding him, he is entitled to appeal to the Court of Appeal, and the judgment of that Court is conclusive upon all inferior tribunals.

This being the effect of that decision, it results from it that the judgment of the Judge or Court so given, if not appealed from, is final and conclusive, and so the judgment of Ferguson, J., not having been appealed from, was final and conclusive, and was well pleaded in bar of this action.

The judgment of MacMahon, J., was therefore right, and the motion must be dismissed with costs.

G. F. H.

RACHER V. PEW ET AL.

Life Insurance—Benefit Certificate—Wife and Children—Reapportionment by Will—Revocation of Trust—Validity.

By the rules of a benefit society the money secured by certificate was payable upon the death of a member to his widow and children, but in this case the member, by a codicil to his will, made shortly before his death, which occurred in October, 1886, directed that the moneys payable upon his certificate, which was issued in February, 1884, should be used by his widow to pay off the mortgage upon his farm. The money was paid to the widow, and she used it as directed, giving the plaintiff, a daughter of the deceased, the benefit of maintenance on the farm, until she married, at the age of nineteen. The plaintiff claimed her share, alleging a trust in her favour which could not be revoked by the codicil :—

Held, following *Videan v. Westover* (1897), 29 O. R. 1, that the provision made by the codicil was a reapportionment of the fund, which the deceased had power to make.

THIS action was brought by Ida A. Racher, a *Statement.* daughter of Thomas W. Pew, deceased, to recover from her mother, the defendant Margaret Pew, and her brother and sister, her share of the sum of \$1,100 insurance moneys arising from a certificate or policy upon the life of her father in the Canadian Mutual Benefit Aid Association. By the rules of the association the money was payable to the widow and children, but the assured, by a codicil to his will, directed that it should be used by his widow to pay off the mortgage on his farm. The money was paid to the defendant Margaret Pew by the association, and she used it as directed, giving the plaintiff the benefit of maintenance on the farm until she married at the age of nineteen. The plaintiff claimed her share, alleging a trust in her favour which could not be revoked by the codicil. The remaining facts are stated in the judgment.

The action was tried before FALCONBRIDGE, J., without a jury, at Barrie, on the 5th December, 1898.

W. Kingston, Q.C., for the plaintiff.

Pepler, Q.C., and *John Dickinson*, for the defendant Margaret Pew.

The other defendants did not appear.

Judgment. January 5, 1899. FALCONBRIDGE, J. :—
Falconbridge,
J.

Following is the order of events and of legislation :
R. S. O. 1877 ch. 129 ; 41 Vict. ch. 8, sec. 14, amending
sec. 13 of the Revised Statute, which gave power to borrow
on a policy to keep it in force.

This amendment does not affect this case, nor does the
amendment 44 Vict. ch. 15, substituting a new section for
sec. 15 of the Revised Statute as to the insured directing
application of bonuses, etc.

Then the certificate issued on the 13th February, 1884.
Then the 47 Vict. ch. 20, assented to on the 25th March,
1884. Codicil (undated) drawn two or three months
before the testator's death, which took place on the 20th
October, 1886. The will bore date the 27th December, 1881.

Probate of the will and codicil were granted on the
28th March, 1887, to the widow of the testator, the defend-
ant Margaret Pew, to whom letters of guardianship of the
infants Alice Adelaide, Ida Aldridge (now Ida A. Racher,
the plaintiff), and the defendant John Henry Alexander,
were granted on the 13th April, 1887.

The insurance money was paid to her by cheque of the
Canadian Mutual Benefit Aid Association, dated 15th
April, drawn "to Margaret Pew, wife and beneficiary
executrix for the will of the late Thomas W. Pew and
guardian of infant children John H. Pew and Ada A.
Pew," and it was indorsed by her in the same way.

The mortgage which the defendant Margaret assumed to
pay off bore date the 18th January, 1877, and it was paid
off and a discharge thereof taken from the assignee thereof
on the 16th April, 1887, and the discharge was registered
on the 20th April, 1887.

In *Swift v. Provincial Provident Institution* (1890),
17 A. R. 66, it was held, overruling *Re O'Heron* (1886), 11
P. R. 422, that the 47 Vict. ch. 20 applies to insurance in
societies incorporated under the Benevolent Societies Act,
R. S. O. 1877 ch. 167, without reference to the 51 Vict.
ch. 22.

The Chancellor held in *Scott v. Scott* (1890), 20 O. R. ^{Judgment.} 313, that the effect of an indorsement on a policy that the moneys due at his death should be paid to his daughter was to withdraw that money from the insurer's control, and that his will was invalid as far as it assumed to deal with the policy in a manner repugnant to her absolute right to possession of the particular fund. ^{Falconbridge, J.}

In *re Lynn* (1891), 20 O. R. 475, the same learned Judge held that a will devising an insurance policy or certificate to executors for the benefit of the testator's wife and children was a sufficient declaration under R. S. O. 1887 ch. 136, sec. 5; and he took the same view in *Beam v. Beam* (1893), 24 O. R. 189. These two cases were approved by the Court of Appeal (Osler, J. A., dissenting) in *McKibbon v. Feegan* (1893), 21 A. R. 87.

In *Mingeaud v. Packer* (1891), 21 O. R. 267, a person insured in a benefit society, after the death of his first wife, caused to be issued to him a certificate making the insurance money payable to his children. Then he married again, and caused a new certificate to be indorsed making the money payable to his second wife. A Divisional Court held that the certificate had become a trust for the children, and that he could not revoke it and replace it as he had essayed to do.

The Court of Appeal (1892), 19 A. R. 290, affirmed this judgment by a division of opinion.

It was followed in *Neilson v. Trusts Corporation of Ontario* (1894), 24 O. R. 517, where it was held that the insured, while he might vary, could not destroy, the trust created by the policy and declare a new trust which would or might deprive his children of all benefit in the trust.

In *Re Grant* (1895), 26 O. R. 120, the Chief Justice of the Queen's Bench held that on the construction of R. S. O. 1887 ch. 136, sec. 6 (1), as amended by 51 Vict. ch. 22, sec. 3, and by 53 Vict. ch. 39, sec. 6, the insured could not by his will declare that others than those for whose benefit he had declared the policy to be should be entitled to the insurance money, nor could he by will apportion it

Judgment. among others than those for whose benefit he has effected the policy or declared it to be.
Falconbridge,
J.

In *Re Wilson* before me in Chambers on 3rd December, 1897, the insured had by his will essayed to alter the trust contained in the policy so as to have the effect of making the insurance money part of his estate and applicable to payment of debts, and it was held that he could not do so.

In *Videan v. Westover* (1897), 29 O. R. 1, a reapportionment made by the will of the assured whereby the defendant, who was an "ordinary beneficiary" only, was deprived of her benefits, was held to be valid, the certificate having been issued, the will made, and the death of the assured having occurred, before the passing of 60 Vict. ch. 36. (See now R. S. O. 1897 ch. 203, secs. 151, 154, 159, 160.)

There is an unreported judgment of Mr. Justice Rose in *Re Fenwick*, 1st March, 1898, where the direction of the will was "to apply the moneys payable in respect of my life insurance policies on my life in or towards payment of the mortgages on my real estate." As there were policies to the extent of some \$13,000 on the life of the insured, not payable to the wife or children, the learned Judge thought it clear that the testator did not intend to give any directions as to the policy which was payable to his wife.

And, finally, there is the case of *McIntyre v. Silcox* (1898), 29 O. R. 593,* wherein *Videan v. Westover* is distinguished, the money in the latter case not having been paid over.

These are, I think, all the authorities in our Courts on the subject.

I do not think the plaintiff's counsel made any point of the fact that the 47 Vict. ch. 20 did not come into force until after the effecting of this insurance, but he argued that that statute did not authorize the testator to do what it is claimed he has done, viz., to divert to his own estate pro-

* Affirmed, *post* p. 488.

perty on which a trust had been impressed, and to make a new plan, as the result of which the plaintiff may be excluded from all benefit. "Benefit," according to the interpretation clause, R. S. O. 1897 ch. 203, sec. 2, sub-sec. 34, "shall include all benefit, bonus and insurance moneys payable by the insurer under the contract." In this sense it is more than likely that she will be cut out, but in another sense she has received substantial benefit in having had a home and maintenance from the age of fourteen to that of nineteen, when she got married.

Judgment.
Falconbridge,
J.

Benefit (*vid.* Murray, *sub verb.*), *benefactum*, *bienfait*, is primarily a thing well done; a good or noble deed; now, in its ordinary sense, advantage, profit, good. It was a thing well done, and it was for the advantage, profit, and good of this plaintiff (albeit she may never have money paid to her in hand), that the home should be preserved and the family kept together during the tender years of the plaintiff and of some of her brothers and sisters. It is a transaction which, the law permitting, I shall endeavour to uphold.

It seems to me that *Videan v. Westover* (1897), 29 O. R. 1, furnishes ample authority for upholding it.

In two of the cases strongly relied on by the plaintiff the new beneficiary was a second wife, who was not a wife at the time of the declaration.

The action will be dismissed with costs.

[The plaintiff launched an appeal from this judgment to a Divisional Court, but did not prosecute it. An order dismissing it was made on the 10th April, 1899.]

E. B. B.

[DIVISIONAL COURT.]

MCINTYRE v. SILCOX ET AL.

Life Insurance—Death of Children—R. S. O. 1887 ch. 136—Re-apportionment—Will—Grandchildren—Cancellation and Re-issue of Policies—60 Vict. ch. 36 (O.)—Creditors.

Judgment of MEREDITH, J., 29 O. R. 593, affirmed.

Statement. AN appeal by the defendant Lemuel Clark from the judgment of MEREDITH, J., 29 O. R. 593, in so far as that judgment was against the appellant. The facts are stated in the former report and in the present judgments.

The appeal was heard by a Divisional Court composed of ARMOUR, C.J., FALCONBRIDGE and STREET, JJ., on the 27th January, 1899.

J. A. Robinson, for the appellant, cited *Re Carbery* (1898), 30 O. R. 40; *Re Grant* (1895), 26 O. R. 120.

T. W. Crothers, for the defendants the executors of the will of Elijah Clark, opposed the appeal and cited *McKibbon v. Feegan* (1893), 21 A. R. 87.

February 25, 1899. STREET, J. :—

The facts out of which the questions in this case arise are as follows :—

On the 7th March, 1885, Elijah Clark effected two policies of insurance upon his life, for \$2,000 and \$3,000 respectively, with the Provincial Provident Institution of St. Thomas, and made the amount of each policy payable at his death to six of his children, viz. :

Lemuel Clark,	} These three children survived Elijah Clark, and are still living.
Augustus Clark,	
Laura May Clark,	
Maryetta Clark,	} These three children died in Elijah Clark's lifetime.
Vesta Ann Clark,	
and Rowland Clark,	

in equal shares.

On the 17th March, 1894, he made a will by which, *inter alia*, he bequeathed the proceeds of these policies in the following words: "Of my policies of life insurance in the Provincial Provident Institution of St. Thomas, in said county of Elgin, I give the proceeds thereof as follows, to wit:

Judgment.

Street, J.

"To my son Junius the sum of.....\$ 800
 To my son Augustus " 1,900
 To my son Lemuel " 300, and
 To my daughter Laura May the sum of 1,200
 And to each of my grandchildren,
 Wilbert McIntyre, Herbert Clark,
 Ernest Clark, and Roy Clark, I give
 the sum of \$200 800 "

\$5,000

and he appointed the defendants George Silcox, his brother-in-law, and Junius Clark, his son, to be his executors.

On the 18th April, 1894, he induced the insurance company to cancel the original policies and to issue two new ones in their place, bearing the same date as the originals, but making the insurance moneys payable to his executors in trust. He died on the 29th December, 1894, and probate of his will was granted on the 28th January, 1895, to his executors, who, in September, 1895, disposed of the proceeds of the policies in accordance with the provisions of the will, so far as the testator's children were concerned, but applied the shares of the grandchildren, including the share of the plaintiff, in the payment of debts, the other assets being insufficient, and the grandchildren not being, under the Act then in force, entitled to priority over creditors. No objection was made at the time to this disposition by any of the parties interested.

The present action was brought on the 15th April, 1897, by Wilbert McIntyre, one of the grandchildren, against the executors only, asking for a construction of the will and for payment of his legacy of \$200.

Upon the action coming on for trial on the 4th October,

Judgment. 1897, before Sir William Meredith, C.J., he directed the
Street, J. beneficiaries to be added or represented, whereupon Lemuel Clark, Augustus Clark, Laura May Clark, and Ernest Clark, Herbert Clark, and Roy Clark (the last three being infants), were added as defendants and brought before the Court.

The action then came on for trial at St. Thomas, on the 9th and 10th May, 1898, before Meredith, J., who, after hearing admissions and argument, ordered that judgment should be entered for administration of the estate as upon a summary application, or dismissing the action, as the plaintiff might within one month elect; in default of any election, ordering that the action should be dismissed; in any case, ordering the plaintiff to pay the costs of the infant defendants and of the executors down to and including the judgment to be entered; subsequent costs reserved. This judgment, and the reasons for it, are set forth in 29 O. R. 593 *et seq.*

The defendant Lemuel Clark moved by way of appeal from this judgment, before the Divisional Court, and claimed that judgment should be given in his favour for \$833 and interest against the executors, upon the grounds:

1st. That under the provisions of sec. 8 of ch. 136, R. S. O. 1887, the testator could only dispose of the shares which had lapsed by the death in the testator's lifetime of three of the original beneficiaries, and when this was done his powers under sec. 8 were at an end.

2nd. That the power under sec. 6 is the only power given by the Act to reapportion shares among the living beneficiaries, and under that section Junius Clark could not be taken in, and the apportionment to him is therefore void.

3rd. Or that the attempted apportionment by will, being beyond the testator's powers, is void altogether, and the original apportionment must stand.

I think we should follow the decision in *Re Grant* (1895), 26 O. R. 120, as to the meaning of the words, "an instrument in writing," where they are used in secs. 6 and 8 of ch.

136, R. S. O. 1887, and that we should therefore hold that a will is not within their meaning. There is no conflict necessary between the decision in that case, and that of the Court of Appeal which preceded it, in *McKibbon v. Feegan* (1893), 21 A. R. 87, where different language in another section of the Act was held to include a will.

The death of the testator's three children, Maryetta, Vesta Ann, and Rowland, in his lifetime, left him with their three shares, amounting together to \$2,500, in his hands. As he made no disposition of them by "an instrument in writing," they became part of his estate, to be disposed of in any way he thought proper, and were subject to the claims of his creditors.

The other \$2,500, originally allotted to the three children who survived him, viz., Lemuel, Augustus, and Laura May, was, by the latter part of sec. 6, sub-sec. 1, subject to redistribution by his will amongst those three children.

It is our duty to give effect, so far as we can, to all the provisions of the will, and we can do so here without difficulty, so far as the present appellant, Lemuel Clark, is concerned, by holding that the testator, in the redistribution which he was authorized by will to make amongst the three survivors of the original allotment, has seen fit to cut down the share of Lemuel to \$300, which has been long since paid him. I cannot see that he can claim anything more, and his motion should therefore be dismissed with costs.

There is nothing in this judgment in any manner conflicting with the judgment of my brother Falconbridge in an unreported case of *Racher v. Pew*, decided 5th January, 1899.*

ARMOUR, C.J.:—

The testator died on the 29th day of December, 1894, and the rights of his beneficiaries are to be determined by the law as it was at the time of his death, the statute 60

Judgment.

Street, J.

*Now reported, *ante* p. 483.

Judgment. Vict. ch. 36 having no application where the insured has Armour, C.J. died before the passing thereof.

The policies of insurance upon the testator's life were for \$5,000 in all, and were expressed on the face of them to be payable to his children Lemuel Clark, Maryetta Clark, Augustus Clark, Vesta Ann Clark, Rowland Clark, and Laura May Clark, in equal shares.

Maryetta Clark, Vesta Ann Clark, and Rowland Clark, died before the testator, and the testator, not having, by any instrument in writing attached to or indorsed on or otherwise referring to and identifying the said policies, made any declaration respecting their shares of the moneys payable by these policies, their shares became the property of the insured, to be dealt with and disposed of by him as he might see fit, and at his death formed part of his estate.

The testator had power by his will to alter the apportionment of the moneys payable by the policies to the surviving children, Lemuel Clark, Augustus Clark, and Laura May Clark, and it cannot well be said that what he did was not within his power—to alter the apportionment in the manner which he did.

The aggregate amount to which these children were entitled was \$2,500, and he apportioned among them \$3,400, and we must assume that the \$2,500 to which they were entitled formed part of that sum, and it could not well be said that he had no power to alter the apportionment of the \$2,500 because he added \$900 to it.

It is unnecessary to say what the consequence might have been if, in altering the apportionment, he had reduced the aggregate sum payable to these children by the policies.

In my opinion, the judgment of my learned brother Meredith, J., is right, and should be affirmed.

The motion will therefore be dismissed with costs.

FALCONBRIDGE, J.:—

Judgment.

In *Racher v. Pew** I felt bound by, and I followed, *Falconbridge, J.*
Videan v. Westover (1897), 29 O. R. 1.

The present case is distinguishable from *Videan v. Westover* and *Racher v. Pew*, for the reason which I point out in the latter case.

I agree in the dismissal of this appeal.

E. B. B.

[DIVISIONAL COURT.]

DANGER V. LONDON STREET R. W. CO.

Street Railways—Negligence—Operation of Car—Collision—Contributory Negligence—Proximate Cause—Nonsuit

Where the evidence of negligence and of contributory negligence are so interwoven that contributory negligence is brought out and established on the evidence of the plaintiff's witnesses, if there is no conflict on the facts in proof, the Judge may withdraw the question from the jury and direct a nonsuit.

Wakelin v. London and South-Western R. W. Co. (1886), 12 App. Cas. at p. 52, referred to.

In an action against a street railway company for negligence, it appeared that an electric car of the defendants was being run at a very rapid speed and that the gong was not sounded as the car approached a certain street, at the junction of which the plaintiff, who was driving a horse along the same street and in the same direction in which the car was going, turned in front of the car to cross the rails, when a wheel of his vehicle was struck by the car, and he was injured. It also appeared by the evidence of his own witnesses that he did not, before turning, look or listen to ascertain the position of the car, although he knew it was coming:—

Held, that this was negligence on his part, and was the proximate cause of the disaster, for the defendants could not, by the exercise of reasonable or any degree of diligence or care, after this negligence of the plaintiff, have avoided the misfortune.

Nonsuit affirmed.

THIS was an action brought in the County Court of Middlesex to recover damages for bodily injuries sustained by the plaintiff owing to the alleged negligence of the defendants. The plaintiff was a gentleman's servant, and was driving his master's horse through the streets of the

* *Ante* p. 483.

Statement. city of London, when a car of the defendants operated by electricity ran into the vehicle in which he was seated and overturned it, causing the injuries complained of. The plaintiff charged that the car was going at too great speed and that due notice was not given of its approach. The facts are fully stated in the judgment of FERGUSON, J.

The Judge of the County Court, at the conclusion of the evidence given at the trial on behalf of the plaintiff, withdrew the case from the jury, and dismissed the action.

The plaintiff moved to set aside the nonsuit and for a new trial, and his motion was heard by a Divisional Court composed of BOYD, C., and FERGUSON, J., on the 24th and 25th February, 1899.

J. B. Clarke, Q.C., for the plaintiff, contended that there was evidence which must be left to the jury, and referred to *Haight v. Hamilton Street R. W. Co.* (1898), 29 O. R. 279; *Toronto R. W. Co. v. Gosnell* (1895), 24 S. C. R. 582; *Green v. Toronto R. W. Co.* (1895), 26 O. R. 379; *Radley v. London and North Western R. W. Co.* (1876), 1 App. Cas. 579; and the defendants' Act of incorporation, 59 Vict. ch. 105 (O.), sec. 25 of by-law in schedule, sub-secs. (j) and (n).

Hellmuth, for the defendants, cited *Thomas v. Citizens Passenger R. W. Co.* (1890), 132 Pa. St. 504; *Allen v. North Metropolitan Tramways Co.* (1888), 4 Times L. R. 561; *Wright v. Midland R. W. Co.* (1884), 51 L. T. N. S. 539.

March 20, 1899. FERGUSON, J.:—

The question is as to whether or not the learned Judge before whom the trial took place was right in ordering a nonsuit to be entered, and thus withdrawing the case from the consideration of the jury.

There is much evidence going to shew that the defendants' car was being run at a very rapid speed and that the gong was not sounded as the car approached Colborne

street, where the accident occurred; and for purposes here it may be assumed that there was negligence on the part of the defendants shewn by the evidence which materially contributed to the disaster. Judgment.
Ferguson, J.

Then as to the contention respecting negligence on the part of the plaintiff which caused or materially contributed to his misfortune.

The defendants' car was going easterly on Dundas street, on the southerly one of the two tracks. The plaintiff, with his horse and buggy, passed out from Gustin's stable, which is on the north side of Dundas street, and crossed the railway tracks to the south side. This was about 150 yards west from Colborne street. At this time the car was, as plaintiff says, as far west as McCormick's factory. The plaintiff then turned and drove easterly along the south side of the southerly track at a not very rapid rate, as he says, about six miles an hour. The buggy was a covered one and the cover was up, yet the plaintiff says he could lean and reach his head forward so as to see around without much difficulty.

The plaintiff was intending to turn from Dundas street and go northward upon Colborne street. He and the car were going in the same direction on Dundas street, the car being behind, and the motor man able to see only the back of the buggy so long as the plaintiff continued to go eastward, and the motor man or other people on the car had no knowledge of the intention of the plaintiff to cross the tracks and go northward on Colborne street.

When the plaintiff reached Colborne street—that is, the centre line of the travel on that street—he turned to drive north across the railway tracks and so along Colborne street. His horse had been prancing and appeared to be a little fractious. At the time the plaintiff so turned, the car going east, the one that struck his buggy, was only twenty feet westward from him, the plaintiff, and the plaintiff did not before making this turn to cross the track in front of the car look or endeavour to look, nor did he listen for any noise, to ascertain the position of the car

Judgment. before crossing the track in front of it, although he knew the car was coming on the track. A car coming from the east on the northerly of the two tracks passed just before the plaintiff turned to cross the tracks, and the plaintiff stopped to let it pass. When the plaintiff's horse had proceeded so far northward as to have his fore feet upon or near the south side of the northerly of the two tracks, to use the plaintiff's own words, "the horse kind of made a stop and swerved around as though it wanted to come away from it south," and at that moment the accident happened, by the railway car striking one of the hind wheels of the plaintiff's buggy and doing mischief to the buggy and inflicting some injury to the plaintiff. In the opinion of some of the witnesses, if the plaintiff's horse had not made the stop and the effort to turn around, he could and would have brought the plaintiff safely across the track, but there would have been but little to spare. Other witnesses do not speak of this at all. There does not appear to be any conflict or want of agreement in the evidence.

It appears to me that this evidence is such as would strike all minds alike, and shew that the plaintiff was guilty of negligent conduct in making the effort to drive across the railway track in front of the approaching car as he did, and in the circumstances that existed. Even if the fault be attributable to the horse, the plaintiff is responsible for it. And it is manifest that this negligence of the plaintiff was the proximate cause of the disaster, for there is no pretence, nor can there be any, that the defendants could, by the exercise of reasonable or any degree of diligence or care, after this negligence of the plaintiff, have avoided the misfortune.

Then, where the evidence of negligence and of contributory negligence are so interwoven as that contributory negligence, if any, is brought out and established in the evidence of the plaintiff's witnesses, if there is no conflict on the facts in proof, the Judge may withdraw the question from the jury and direct a nonsuit or verdict for the defendant; but if there be a conflict or doubt as to the

proper inference to be deduced from the facts in proof, Judgment. then it is for the jury to decide. This seems to be the rule Ferguson, J. stated in *Wakelin v. London and South-Western R. W. Co.* (1886), 12 App. Cas. at p. 52, and, so far as I have been able to see, it is yet the law.

Frequently the matter for consideration in such cases is critical, and very often it is perhaps not a wise course for a Judge to take. In this case, however, I do not see any such conflict or doubt as I have above referred to, and I am of the opinion that the learned judge was right in ordering a nonsuit. I think the appeal should be dismissed. Perhaps the defendants will not exact costs. Should they do so, they are entitled to the costs of the appeal.

BOYD, C. :—

My brother Ferguson has very fully and clearly stated the facts of this case, so that I need not repeat them. I adopt his conclusion that the plaintiff did not use any precaution to protect himself, but went into danger heedlessly and needlessly. Knowing that the car was coming behind him, he suddenly turns his horse upon the track, when there was no time or opportunity to arrest the forward motion of the car.

The expression made use of by Denman, J., in *Davey v. London and South-Western R. W. Co.* (1883), 11 Q. B. D. 213, 219, is apposite, "that the plaintiff brought his injuries upon himself by his own act as much as if seeing the train [car] coming he had tried to cross in front of it." This case was affirmed in 12 Q. B. D. 70.

The law generally is so stated by Mr. Justice Cooley as to crossing of a track by a person who does not use his ordinary senses: Cooley on Torts, p. 680. And the very reasonable rule in such cases is well expressed by Channell, B., in *Stubley v. London and North-Western R. W. Co.* (1865), L. R. 1 Ex., at pp. 19 and 20, that persons "crossing the rails are bound to exercise ordinary and

Judgment. reasonable care for their own safety, and to look this way and that to see if danger is to be apprehended." "And this ordinary care," he goes on to say, "would be sufficient to prevent most accidents." It certainly would have prevented this one, unless the driver had been so utterly reckless as to match his horse against the electric motor. See, also, *Curtin v. Great Southern and Western R. W. Co. of Ireland* (1887), 22 L. R. Ir. 219.

The judgment should be affirmed. I hope costs will not be asked.

E. B. B.

[DIVISIONAL COURT.]

RE E. J. PARKE, POLICE MAGISTRATE OF THE CITY OF LONDON.

Municipal Election—Nomination of Candidate—Keeping Open Poll after Lapse of Hour—Municipal Act, R.S.O. ch. 223, sec. 128.

The provision in sub-sec. 2 of sec. 128 of the Municipal Act, R.S.O. 223, which provides for the closing of the meeting for the nomination of candidates for municipal offices after the lapse of one hour only applies where no more than one candidate is proposed; sub-section 3 applying where more than one candidate is proposed, in which case no time limit is imposed.

Statement. THIS was an appeal from an order of MEREDITH, J., refusing an application for an order by way of mandamus to E. J. Parke, police magistrate of the city of London, commanding him to issue a summons to the returning officer in the last municipal elections for the city of London, to appear before him, the police magistrate, to answer a charge preferred against him, the returning officer, by the applicant, in not adjourning the proceedings for the nomination of mayor, etc., of the said city after the lapse of one hour from the time fixed for holding the meeting for the said nominations.

The application to the police magistrate was made on the information and complaint of W. H. Bartram, barrister-at-law.

ter, taken on oath before the said magistrate on the 31st Statement. December, 1898.

The information was that "Charles A. Kingston, returning officer for the municipality of the city of London, at the meeting of electors for the nomination of candidates for the office of mayor," etc., "on the 26th December, 1898, did without lawful excuse disobey the Act of the Legislature of the Province of Ontario (sec. 128 R. S. O. (1897) ch. 223) in that he wilfully and without lawful excuse did not adjourn the proceedings after the lapse of one hour from the time fixed for holding the meeting, and received nominations after the lapse of the said hour, and for which offence no penalty or other mode of punishment is expressly provided, contrary to section 138 of the Criminal Code, 1892."

The motion for the order for the mandamus was supported by an affidavit of the applicant setting out the information, and that the police magistrate had taken time to consider the matter and had been applied to for his decision, which he gave on the 29th January, 1899, refusing to issue the summons, as he did not think the Code applied to such a breach of the statute law; but stated that he would promptly do so if his opinion was not sustained on an application for a mandamus.

On the 26th January, 1899, the motion came before MEREDITH, J., at the Weekly Sittings at London.

W. H. Bartram, the applicant in person, supported the motion. The information disclosed an offence. There was a disobedience of sec. 128 of the Municipal Act, R. S. O. ch. 223, and there being no penalty or punishment provided by that Act, section 139 of the Criminal Code, 55-56 Vict. ch. 29, (D.) applies, and makes it an offence under the Code, the procedure therefor being given by sections 588-9 of the Code. Under sec. 7 of the Police Magistrates' Act, R. S. O. ch. 97, the police magistrate was the only person who could act in the premises. The duty imposed

Argument. on the magistrate was of a judicial character, and there being a refusal to perform it a mandamus lies: *Queen v. Connolly* (1891), 22 O. R. 220; *Regina v. Carden* (1879), 5 Q. B. D. 1, 5; *Re Holland* (1875), 37 U. C. R. 214.

T. H. Purdom, for the police magistrate, contra. Section 219 and the following sections of the Municipal Act provide the mode for testing the validity of an election, and under these sections the validity of this election can be raised and tried; and under section 204 no election is to be avoided for want of compliance with the provisions of the Act when the mistake or irregularity does not affect the result. Here the election itself has not been questioned. The provisions of the Criminal Code, therefore, do not apply.

Bartram, in reply. The validity of the election is not the question in this proceeding, but whether there has been a disobedience of the provisions of a statute: section 204 does not apply at all. In any event it could only apply when the provisions of the Act have been substantially complied with.

January 29th, 1899. MEREDITH, J. :—

Assuming that section 138 of the Code is applicable to a case of this kind, and assuming that there are no other difficulties in the way, this motion must be refused because no wilful disobedience of any statute has been shewn, and that it ought to be shewn, not only after but also before, any criminal prosecution for such an offence is permitted.

The complaint is made against the city clerk of London, a gentleman learned in the law, and against whose integrity nothing is alleged.

The charge is that he did not close the meeting for the nomination of candidates for municipal officers in London at the lapse of one hour from the time fixed by law for opening it; though a claim was then made that the statute required him to do so. But there is nothing in the statute expressly requiring that to be done.

Section 128 (2) provides that the clerk shall, after the lapse of one hour from the time fixed for holding the meeting, declare the candidate elected, "if only one candidate for any particular office is proposed."

In this case more than one candidate had been proposed within the hour, and so that sub-section was not applicable.

It is the third sub-section that is applicable, and that makes no provision as to the time within which the proceedings under it are to be taken. It merely provides for an adjournment of the proceedings for the purpose of holding a poll in case more candidates are proposed for any particular office than are required to be elected.

It may, or it may not, be held that inferentially the time limited by sub-section (2) is to be applied to sub-section (3), so that the adjournment ought to take place after—that is in a reasonable time after—the lapse of the hour; but it is quite another thing to say that a man may be criminally prosecuted because he failed to put that interpretation upon the sub-section in question, and to have acted upon that interpretation of it.

If the case be one to which the sections of the Code in question could be applicable, then it must be a case to which the maxim *actus non facit reum, nisi mens sit rea* applies, and there should be evidence of guilty intention before criminal proceedings: *Rex v. Borron* (1820), 3 B. & Ald. 432.

There are no facts before me upon which any improper motive could be attributed to the city clerk; there is nothing to shew that he did not act according to the best of his judgment with the purest and best intentions.

Even if it could be assumed that he erred in judgment, as to which I express no opinion one way or the other as the question may be raised in civil proceedings, it is not to be assumed that he acted knowingly and fraudulently: *Regina v. Badger* (1856), 6 E. & B. 137.

It was the duty of the police magistrate, upon receiving the information, to hear and consider the allegations of the informant, and if of the opinion that cause for issuing a warrant or summons was not made out, to refuse it. And,

Judgment.
Meredith, J.

Judgment. having so acted, this Court has no jurisdiction over him.
Meredith, J. It is his judgment, not mine nor that of any other Judge or Court, which is to be exercised under section 559 of the Criminal Code: see *Ex p. Lewis* (1888), 21 Q. B. D. 191; *Regina v. Paynter* (1857), 7 E. & B. 327; and *Regina v. Dayman* (1857), *ib.* 672. This application must therefore be refused.

Motion dismissed with costs.

From this judgment an appeal was made to the Divisional Court.

On February 13th, 1899, before a Divisional Court, composed of ARMOUR, C. J., FALCONBRIDGE and STREET, JJ., the appeal was argued.

W. H. Bartram, in person, supported the appeal. The information discloses an offence, and makes out a case for the issue of a summons to enquire into the matters charged. Section 128 is express in its terms that the returning officer is only to keep open the meeting for one hour, and after the lapse of the hour he is to close the meeting and adjourn the proceedings, and by his not doing so he was guilty of an offence under 139 of the Code.

The police magistrate did not appear.

February 13th, 1899. The judgment of the Court was delivered by

ARMOUR, C. J.:—

Section 128 of the Municipal Act, R. S. O. ch. 223, provides that “(1) At such meetings, the person or persons to fill each office shall be proposed and seconded *seriatim*, and every such nomination shall be in writing, shall state the full name, residence and occupation of the candidate, and shall be signed by his proposer and seconder. (2) If only one candidate for any particular office is proposed, the clerk or other returning officer or chairman shall,

after the lapse of one hour from the time fixed for holding the meeting, declare the candidate duly elected for that office. (3) If more candidates are proposed for any particular office than are required to be elected, the clerk (or other returning officer or chairman) shall adjourn the proceedings for filling such office until the first Monday in January next thereafter," etc. Judgment.
Armour, C.J.

It is obvious that the provision in the second sub-section as to "the lapse of one hour," is only applicable to the case to which that sub-section applies, namely, the case where "only one candidate for any particular office is proposed," in which case the clerk, or other returning officer or chairman, is obliged to allow one hour to elapse before he can "declare the candidate duly elected for that office."

This provision is in such case to prevent the one candidate from being declared duly elected before an opportunity is afforded to nominate another candidate. But where more candidates are proposed for any particular office than are required to be elected, the provisions of sub-section three are applicable, and the provision in the second sub-section as to "the lapse of one hour" is not applicable to such a case.

The appeal must therefore be dismissed with costs.

G. F. H.

[DIVISIONAL COURT.]

THURESSON ET AL. V. THURESSON.

Limitation of Actions—Claim to Realty—Future Estate—Deed of Appointment—Accrual of Right—R. S. O. ch. 133, sec. 5, sub-sec. 11.

On the 25th October, 1870, the plaintiffs' testator purchased certain lands and procured a deed to be made to the grantees named therein to hold to such uses as he should by deed or will appoint, and in default of such appointment, and, so far as such appointment should not extend, to the use of the said grantees, their heirs and assigns. He put his mother in possession of the land, and she so continued up to the time of her death, which occurred on the 21st July, 1878, the defendants, her two daughters, residing with her, and after her death continuing to reside on the land, and remaining in possession until action brought. On 1st November, 1892, the plaintiffs' testator in the alleged exercise of the power of appointment, executed a deed appointing and conveying the lands to another person who then reconveyed to him. He subsequently died, having devised the property to the plaintiffs, and on the 19th March, 1897, an action to recover possession was brought by them:—

Held, that the effect of the deed of the 25th October, 1870, was to vest the fee simple in the lands in the grantees to uses subject to be divested on the exercise of the power of appointment, and that the deed of 1st November, 1892, was a due execution thereof; that the testator's estate, prior to the appointment, was a future estate or interest within the meaning of sec. 5, sub-sec. 11, of the Real Property Limitation Act, R. S. O. (1897) ch. 133, which came into possession on the execution of the deed of 1st November, 1892, and that plaintiffs not being barred by effluxion of time were entitled to recover.

Statement. THIS was an action to recover possession of certain land, tried before ARMOUR, C.J., without a jury, at St. Catharines, on the 30th May, 1898.

In 1870, Eyre Thuresson, through whom the plaintiffs claimed, purchased certain land from Joseph Robinson and Eliza Robinson, his wife, and procured the deed, which was dated 25th October, 1870, to be made to Francis Digby Thuresson, and Eyre Mortimer Thuresson, to certain uses which are set out in the judgment, and put his mother into possession of the property, where she remained until her death, which took place on the 21st July, 1878, the defendants, her two daughters, sisters of Eyre Thuresson, residing with her, and after her death they continued to reside on the property, and had been in possession of it ever since.

This action was brought on the 19th March, 1897.

Statement.

The additional facts, so far as material, are set out in the judgments of the Court.

The learned Chief Justice dismissed the action with costs.

From this judgment an appeal by the plaintiffs to the Divisional Court was argued on January 18th, 1899, before MEREDITH, C.J., ROSE and MACMAHON, JJ.

Aylesworth, Q.C., for the appellants. The question turns on whether the plaintiffs have shewn a good title to the lands. Under deed of 1870 the estate conveyed to the grantee was subject to be divested on the exercise of the power of appointment, and upon the exercise of the power in 1892 by the making of the deed to Boyd the estate was divested and the fee conveyed to Boyd, who conveyed to Eyre Thuresson, and therefore the plaintiffs have a good title in fee simple to the lands. The question then arises whether the possession of the defendants has barred the plaintiffs' right, and this depends upon the construction to be put upon the Real Property Limitation Act. The plaintiffs' testator had up to exercise of the power of appointment a future estate or interest in the land to come into effect on the determination of the particular estate, namely, the estate conveyed to the grantees of the deed of 1870, and upon making of the deed of 1892 it was turned into an estate in possession. The sections of the Act bearing on this question are sec. 5, sub-sec. 11 and 12, and sec. 6 sub-secs. 1 and 2. The plaintiffs' testator had five years from 1892, when the appointment was made: *Pedder v. Hunt* (1887), 18 Q. B. D. 565. It is immaterial that the particular estate here has been lost by lapse of time. The right of Eyre Thuresson accrued when the future estate became an estate in possession: *Evans v. Evans*, [1892] 2 Ch. 176; Darby & Bosanquet's Statutes of Limitations, 2nd ed., 325-6.

Argument.

Armour, Q.C., contra. The judgment of the learned Judge is correct. The estate conveyed to the grantees by the deed of 1870 was not a particular estate but the whole estate, and there is no future estate within the meaning of the statute. The estate of the grantees under the deed of 1870 having been barred by the statute, the whole estate was at an end, and there was nothing upon which the deed of appointment could operate, and nothing passed to Boyd, and so from Boyd to the plaintiffs; and the plaintiffs, therefore, failed to shew any title to the land: *Sanders on Uses*, 4th ed., vol. I., p. 146; *Preston on Estates*, vol. II., p. 4.

February 14th, 1899. MEREDITH, C. J. :—

This action is for the recovery of land, and was commenced on the 19th March, 1897, and the defendants rely upon the Real Property Limitation Act as a defence to it.

The land in question was, on the 25th October, 1870, by indenture of that date, granted by Joseph Robinson and Eliza, his wife, to Francis Digby Thuresson and Eyre Mortimer Thuresson, parties to the indenture of the second part, their heirs and assigns, and the *habendum* is in the words following:—

“To have and to hold the same unto the said parties of the second part to such uses as Eyre Thuresson, of the said village of Ancaster, manufacturer, shall by any deed or deeds, or by his last will and testament, appoint; and in default of and until such appointment, and so far as any such appointment shall not extend, to the use of the said parties of the second part, their heirs and assigns forever.”

The power of appointment contained in this deed was not exercised by Eyre Thuresson until the 1st November, 1892, when he, by indenture of that date, appointed [and assumed also to convey] the land to Edward Wilson Boyd in fee simple.

Boyd, by indenture of the 2nd November, 1892, conveyed the land to Eyre Thuresson, who died on the 15th April, 1894, and the plaintiffs claim title under his will.

The defendants have been in possession of the land since the year 1878, and, as I have said, set up the Real Property Limitation Act as a defence to the action; and the question for decision is as to the effect of the defendants' possession upon the rights of Eyre Thuresson and those claiming under him in the circumstances I have mentioned.

Judgment.

Meredith,
C.J.

It is clear, I think, that the effect of the conveyance of 1870 was to vest the fee simple in the land in the parties of the second part to the conveyance subject to be divested by the exercise by Eyre Thuresson of the power to the extent to which he might exercise it (Ferne on Contingent Remainders, 10th ed., vol. 1, 226 *et seq.*; Sugden on Powers, 8th ed., 453, 454; Marsden on Perpetuities, 42); and that, apart from the question of the effect of the Statute of Limitations upon the execution of the deed of appointment by Eyre Thuresson, the estate of the parties of the second part was divested and an estate in fee simple in possession vested in Boyd by force of the Statute of Uses in respect of the use appointed in his favour: Williams on Real Property, 18th ed., pp. 355-8.

The limitation to the uses which Eyre Thuresson might appoint was executory in its nature, and the estate or interest, until the power was exercised, was a future estate or interest within the meaning of the Real Property Limitation Act R. S. O. (1897), ch. 133: *James v. Salter* (1837), 3 Bing. N. C. 544, at p. 554; *Doe d. Johnson v. Liversedge* (1843), 11 M. & W. 517; *Jumpsen v. Pitchers* (1843), 13 Sim. 327.

By section 4 of the Act the right to make an entry or distress, or bring an action to recover land or rent, is limited to ten years next after the time at which the right to make the entry or distress or bring the action first accrued to some person, through whom the person making or bringing it claims; or if the right did not accrue to any person through whom he claims, then to ten years next after the time at which the right to make the entry or distress or bring the action first accrued to the person making or bringing the same.

Judgment.
Meredith,
C.J.

Section 5 declares when the right to make an entry or distress, or bring an action to recover any land or rent, shall be deemed to have first accrued in the cases with which its sub-sections deal. This section is said to be illustrative, but not exhaustive, of the cases to which section 4 may be applicable: Darby & Bosanquet on Limitations, 2nd ed., p. 286, and the cases referred to in Note (1) at the foot of p. 286. See also Smith's Leading Cases, 10th ed., pp. 642-3.

By sub-sec. 11 of sec. 5, it is provided that "Where the estate or interest claimed is an estate or interest in reversion or remainder, or other future estate or interest, and no person has obtained the possession or receipt of the profits of such land, or the receipt of such rent, in respect of such estate or interest," the right mentioned in section 4 "shall be deemed to have first accrued at the time at which such estate or interest became an estate or interest in possession."

If the Act had stopped there it would seem clear that as the estate which the plaintiffs claim did not become an estate in possession until the execution of the deed of appointment of the 1st November, 1892, the statute did not until then begin to run against the appointee, and the plaintiffs must succeed. But section 6, which was relied on by the plaintiffs' counsel as the one applicable in this case, provides:—

"6. If the person last entitled to any particular estate on which any future estate or interest was expectant has not been in the possession or receipt of the profits of such land, or in receipt of such rent, at the time when his interest determined, no such entry or distress shall be made, and no such action shall be brought, by any person becoming entitled in possession to a future estate or interest, but within ten years next after the time when the right to make an entry or distress, or to bring an action for the recovery of such land or rent, first accrued to the person whose interest has so determined, or within five years next after the time when the estate of the person becoming entitled in possession has become vested in possession, whichever of those two periods is the longer."

If this section be the one applicable, the plaintiffs are entitled to recover, for though the right of entry of the parties of the second part to the conveyance of 1870 was barred before this action was commenced, five years had not then elapsed from the time when the estate appointed to the use of Boyd by the deed of the 1st November, 1892, became an estate in possession.

The doubt as to the applicability of section 6 arises upon the words "if the person last entitled to any particular estate on which any future estate or interest is expectant."

The term "particular estate" is not strictly applicable to the estate which preceded that appointed to Boyd, which was a determinable fee simple.

In Preston on Coveyancing, 3rd ed., vol. 3, p. 169, the author, after giving a list of interests of inheritance treating of the gradation of estates, says:

"Of all estates a fee simple is the most extensive * *. Estates of an inferior degree, except the other estates in fee which have been enumerated," (*i.e.*, determinable fees, qualified fees, conditional fees), "are called particular estates, or estates giving a particular portion of time as contrasted with time indefinitely, and time indefinitely is the extent of an estate in fee."

It is unnecessary, however, to pursue the inquiry further; for if section 6 be not applicable, then sub-sec. 11 of sec. 5 applies, and the plaintiffs' action is in time, so that *quâcunque viâ* the plaintiffs' right is not barred.

Sub-secs. 11 and 12 of sec. 5, and sec. 6 of the Ontario Act are taken from the Imperial Act, 37 & 38 Vict. ch. 57, sec. 2, the purpose of which was explained by Lord Selborne in introducing, in 1873, the Bill upon which the Act 37 & 38 Vict. was founded. See Charley's Real Property Acts, 2nd ed., p. 35 *et seq.*, where the explanation will be found, and also a reference to an explanatory note from Vice-Chancellor Hall, who drafted the Bill of 1873, as to the meaning of what forms section 6 of the Ontario Act.

Mr. Armour, as I understood his argument, contended that, inasmuch as by the effect of section 15 the right and

Judgment.

Meredith,
C.J.

Judgment.
Meredith,
C. J.

title of the parties of the second part to the conveyance of 1870 to the land was extinguished before the deed of appointment was executed, there was no seisin remaining in the grantees to the uses to serve the uses declared by the latter deed, and that it was therefore ineffectual; but it would appear to me that sec. 28 of ch. 119 of the R. S. O. is an answer to this contention. By that section the existence of *scintilla juris* was abolished, and limitations to uses were declared to take effect as they arise without continued seisin or *scintilla juris* in the persons originally seized to the uses: see Sugden on Powers, 8th ed., pp. 18, 19, 20; Williams on Real Property, 18th ed., pp. 355-6.

The appeal should, in my opinion, be allowed with costs, the judgment pronounced at the trial be reversed, and judgment entered for the plaintiffs for the recovery of the land with costs.

I refer also to *In re Earl of Devon's Settled Estates*, [1896], 2 Ch. 562.

MACMAHON, J. :—

The action was commenced on the 19th March, 1897, and is to recover possession of certain lands and premises in St. Paul street, in the city of St. Catharines.

The paper title was admitted, commencing with a deed, dated 25th October, 1870, made in pursuance of the Act respecting Short Forms of Conveyances, from Joseph Robinson and Eliza Robinson, of the first part, to Francis Digby Thuresson and Eyre Mortimer Thuresson, of the second part. In consideration of the sum of \$1,700, "the parties of the first part do grant to the said parties of the second part, their heirs and assigns forever," the said described lands.

The *habendum* is : "Unto the said parties of the second part to such uses as Eyre Thuresson of the said village of Ancaster, manufacturer, shall by any deed or deeds or by his last will and testament appoint; and in default and until such appointment and so far as any such appoint-

ment shall not extend, to the use of the said parties of the second part, their heirs and assigns forever.”

Judgment.

MacMahon,
J.

Eyre Thuresson, in whom is vested the power of appointment, is not the Eyre Mortimer Thuresson one of the grantees mentioned in the deed.

Eyre Thuresson, who was, it appears, the purchaser of the land in question, was a brother of the defendants, and it was admitted that Mrs. Thuresson, their mother, went into possession of the land and premises in 1870, the defendants living with her. Mrs. Thuresson died in July, 1878, and the defendants have remained in possession ever since.

On the 1st November, 1892, Eyre Thuresson by deed, after reciting the conveyance from Joseph Robinson and his wife to Francis Digby Thuresson and Eyre Mortimer Thuresson, and also reciting that he (Eyre Thuresson) was desirous of exercising the power therein conferred, for the purpose of conveying the property to Edward Wilson Boyd (the party of the second part mentioned in the said deed), in the exercise of the power of appointment and also in consideration of the sum of one dollar, appointed and conveyed the said lands and premises to Edward Wilson Boyd, Esquire, of the city of Toronto.

On the 2nd November, 1892, Edward Wilson Boyd, in consideration of one dollar, conveyed the said lands and premises to Eyre Thuresson.

Eyre Thuresson died on the 15th April, 1894, and the plaintiffs are the executors of his estate and claim under his will.

The defendants set up the Statute of Limitations as a bar to the action.

Mr. Aylesworth, for the plaintiffs, contended that as by the *habendum* the grantees Francis Digby Thuresson and Eyre Mortimer Thuresson, are to hold merely to such uses as Eyre Thuresson may appoint, a future estate existed; and upon the exercise of the power of appointment, the plaintiff had under the provisions of sec. 6 of the Statute of Limitations, R. S. O. ch. 133, five years after exercising the power within which to bring his action.

Judgment.

MacMahon,
J.

The office of the *habendum* is to limit with certainty the estate contained in the premises. And in Sheppard's Touchstone, p. 75, the author says: "The 'premises' of a deed are all the foreparts of the deed before the *habendum*. And yet this word is sometimes taken for the thing demised, or granted, by the deed * *. And herein also is sometimes (though improperly) set down the estate." And in the notes to pp. 75-6 are inserted the following statement and illustrations: "Where the *habendum* is repugnant to, or inconsistent with the premises the *habendum* is void, and the grantee will take the estate given in the premises. * * There are cases, however, where the *habendum* is allowed to enlarge, restrain, or explain the premises * * (*Mortimer's case* (1333), 8 Rep. 154b). For although the nature of the estate given in the premises cannot be *entirely altered* by the *habendum*, yet it may be *qualified* by it; as in that case there will be no absolute repugnancy between the premises and the *habendum*. * * So, if lands are given in the premises to A. and his heirs, *habendum* to him and the heirs of his body, he will take only an estate tail, because the *habendum* qualifies and restrains the general import of the word 'heirs' to the lineal descendants of the grantee." (8 Co. Rep. 154b. Cro. Jac. 476, Co. Litt. 21.)

And Preston, in his Treatise on Estates, as illustrating the effect of the *habendum*, vol. 2, p. 4, says: "Thus, under a gift to a man and his heirs and assigns forever; and if he shall die without heirs of his body, then to another person, the donee will, even in a deed, have an estate tail, and not an estate in fee simple. So a grant by the premises of a deed to a man and his heirs, and the *habendum* to him and his heirs for several lives (*Skin. 44, Wilkins v. Daure* (1608), Brownl. & Gold. 169), gives an interest for the lives only; for the words of the *habendum* are explanatory of the intention, and shew, that though the heirs are to be entitled, they are to take for a limited time, and not generally and indefinitely. On the other hand, a grant to a man and his heirs of his body, *habendum* to him and his

heirs (*Turnman v. Cooper* (1618), Cro. Jas. 470) gives him several estates ; one in tail, the other in fee.

“All these and the like cases, of which there are a great variety, are authorities proving no more than that the word ‘heirs’ may be qualified and explained to mean a limited interest ; and that it does not, *ex vi termini*, and in opposition to a manifest intention, import a fee simple.”

Judgment.
MacMahon,
J.

Eyre Thuresson was the purchaser and paid the consideration money for the property, and the manifest intention as expressed by the *habendum* was that the grantees should take the fee subject to the exercise by Eyre Thuresson of the power to such uses as he might appoint, which enabled him, at any moment, to divert, or destroy, the estate of the grantees therein.

In dealing with the question argued before us, as to the effect of the exercise of such a power as is contained in the deed in question before us, Mr. Sanders, in his work on Uses, vol. I., pp. 144, 145, says that there is a species of shifting or future use, which arises from the act of some agent or person nominated in the deed, and this is called a use arising from the execution of a power. Every power of this kind is a power of revocation and new appointment ; for the new uses and estates created under the appointment must necessarily (as to the extent of such appointment) revoke, defeat, or abridge, the uses which existed, and were executed previously to the new limitation.

Assuming for the present that Eyre Thuresson had on the 1st November, 1892, a right to exercise the power of appointment, was he on that date exercising such power in regard to what is known as a “future estate” ?

There are two kinds of future estates, a contingent remainder and an executory interest. The estate existing here, and upon which the power was exercised, was an executory interest. And one way of creating an executory interest, is under the Statute of Uses called springing or shifting uses. “One of the most convenient and useful applications of springing uses occurs in the case of powers, which are methods of causing a use, with

Judgment. its accompanying estate to spring up at the will of any given person:—Thus, lands may be conveyed to A. and his heirs to such uses as B. shall, by any deed or by his will, appoint, and in default of and until any such appointment to the uses of C. and his heirs, or to any other uses. These uses will accordingly confer vested estates on C., or the parties having them, subject to be divested or destroyed at any time by B.'s exercising his power of appointment. Here B. though not owner of the property, has yet the power at any time, at once, to dispose of it by executing a deed; and if he should please to appoint it to the use of himself and his heirs, he is at perfect liberty so to do; or, by virtue of his power, he may dispose of it by his will. Such a power of appointment is evidently a privilege of great value; it is nearly as good as ownership; and it has accordingly been made to share the liabilities of ownership": Williams on Real Property, 352 and 356.

The execution by Eyre Thuresson of the power was the event on which the use was to spring up and so destroy the estate already existing. The moment therefore that he executed the power of appointment in favour of Edward Wilson Boyd and his heirs, Boyd had an estate in fee simple in possession vested in him by virtue of the Statute of Uses in respect of the use so appointed in his favour; and the previously existing estate in favour of Francis Digby Thuresson and Eyre Mortimer Thuresson was therefore completely at an end: Williams (7th ed.), p. 358.

Then was Eyre Thuresson barred before he exercised the power of appointment?

The 4th section of our Real Property Limitation Act, provides that "No person shall make any entry or distress, or bring any action to recover any land or rent, but within ten years next after the time at which the right to make such entry or distress, or to bring such action, first accrued to some person through whom he claims; or if such right did not accrue to any person through whom he claims, then within ten years next after the time at which the

right to make such entry or distress, or to bring such action, first accrued to the person making or bringing the same." Judgment.
MacMahon,
J.

This is taken from the Imperial Act, 3 & 4 Wm. IV. ch. 27, sec. 2, and 37 & 38 Vict. ch. 57, sec. 1, with the exception of the time limit which in the Imperial Act is twelve years. And Dart on Vendors and Purchasers, 6th ed., at p. 435, discussing the effect of sec. 2 of ch. 27 of 3 & 4 Wm. IV., says: "The general principle is, that when a person has been in possession or receipt of the profits of the land, or in receipt of rent, the right accrued at the time when he ceased to hold such possession or receive such profits or rent (*Owen v. De Beauvoir* (1847), 16 M. & W. 547); while in the case of a person who has never had such possession or receipt, the right accrued when he first became entitled (whether by descent, alienation, falling in of a remainder or reversion, forfeiture, devise or otherwise) to enter into such possession or receipt": *James v. Salter* (1836), 2 Bing. N. C., p. 505.

Then sub-secs. 11 and 12 of sec. 5 (which are taken from Imperial Act, 3 & 4 Wm. IV. ch. 27, secs. 3 and 5, and 37 & 38 Vict. ch. 57, sec. 2), make provision for the case of future estates as follows:—

"11. Where the estate or interest claimed is an estate or interest in reversion or remainder, or other future estate or interest, and no person has obtained the possession or receipt of the profits of such land, or the receipt of such rent, in respect of such estate or interest, then such right shall be deemed to have first accrued at the time at which such estate or interest became an estate or interest in possession."

"12. A right to make an entry or a distress, or to bring an action to recover any land or rent, shall be deemed to have first accrued, in respect of an estate or interest in reversion or remainder, or other future estate or interest, at the time at which the same became an estate or interest in possession, by the determination of any estate or estates in respect of which such land has been held or the profits

Judgment. thereof or such rent have been received, notwithstanding
MacMahon, that the person claiming such land or rent, or some person
J. through whom he claims, has, at any time previously to the
creation of the estate or estates which have determined,
been in the possession or receipt of the profits of such
land, or in receipt of such rent."

Then provision was made by the Imperial Act, 37 & 38
Vict. ch. 75, sec. 2 (our Act, sec. 6 (1)), for limiting the
time as to future estates or interests when the person
entitled to a particular estate is out of possession.

Section 6 (1), reads:

"If the person last entitled to any particular estate on
which any future estate or interest was expectant has not
been in the possession or receipt of the profits of such land,
or in receipt of such rent, at the time when his interest
determined, no such entry or distress shall be made, and
no such action shall be brought, by any person becoming
entitled in possession to a future estate or interest, but
within ten years next after the time when the right to
make an entry or distress, or to bring an action for the
recovery of such land or rent, first accrued to the person
whose interest has so determined, or within five years next
after the time when the estate of the person becoming
entitled in possession has become vested in possession,
whichever of those two periods is the longer."

By sub-secs. 11 and 12 of sec. 5, all estates in remainder
and reversion, or other future estates, became estates or
interests in possession by the determination of any estate
or estates in respect to which such land had been held,
that is, in the case of an estate in reversion, or remainder,
if the "particular estate" which was carved out of the fee
was a life estate, then in either case immediately on the
death of the tenant for life, the estate of the reversioneer or
remainderman became an estate in possession. So in
respect of the particular executory interest with which we
are now dealing, which is a future estate, it became an
estate in possession by the determination of the estate held
by the grantees under the conveyance of 1870, on the exer-

cise by Eyre Thuresson of the power of appointment in 1892, and not until then did the statute begin to run against Boyd, in whose favour the appointment was made. Judgment.
MacMahon,
J.

I think that the plaintiffs are entitled to succeed by virtue of sub-sec. 11 of sec. 5, and their appeal must be allowed, and judgment directed to be entered in their favour for possession of the land, with costs.

ROSE, J., concurred.

G. F. H.

LAZIER V. ROBERTSON ET AL.

Settlement—"Children"—Vested Remainder.

By a marriage settlement certain land was conveyed to trustees in trust to sell and convey, as the husband and wife might appoint, and to invest the money and pay the interest to the wife during life, and in case the husband survived the wife, and there was a child or children then surviving, to pay the interest to the husband during life, and after the decease of both to divide the money equally among the children, and if there was only one child to pay the whole to such child, and in case of the death of the wife without issue to pay the money to the husband, and in case the husband and wife did not make any appointment, then in trust to support the contingent remainders thereafter limited, and to pay the rents on the same trusts as the money. Two children were born; the husband died; one of the children attained twenty-one, married, and died before his mother, leaving his sister and a daughter surviving. On the death of the mother:—

Held, that the deceased son took a vested interest, although he died before the period for conveying, and that his daughter was entitled to her father's share.

THIS was a motion for judgment on the pleadings in an action for the construction of a marriage settlement. The following statement of facts is taken from the judgment:— Statement.

The plaintiff is sole trustee under the marriage settlement made between William Robertson and Jane Robertson, deceased, by order of Court, dated 9th March, 1888; the original trustees having at that time departed this life.

Statement.

The defendant Margaret Lazier, is a daughter of the said William and Jane Robertson; and the defendant Ethel Jane Robertson, is a daughter and the only child of Alexander Robertson, deceased, who was a son of the said William and Jane Robertson. Margaret Lazier and Alexander Robertson were the only children born of the marriage between the said William and Jane Robertson.

William predeceased his wife, Jane, and left her and the said two children him surviving. And the son, Alexander, having attained his majority, predeceased his mother in February, 1888, leaving him surviving his only child, the defendant Ethel Jane: and in October, 1898, Jane Robertson died, leaving her surviving her daughter, the defendant Margaret Lazier, and her granddaughter, the said Ethel Jane.

The deed of settlement was post-nuptial, and was made on 19th March, 1838, of lands and tenements only, and was in terms of marriage articles made before the marriage, on 2nd November, 1837, between William and Jane of the one part, and three trustees, now deceased, of the other part, in trust to sell and convey, as William and Jane might appoint, in writing, and to lay out and invest the money arising from such sales, and to pay over from time to time all the dividends and interest arising therefrom to the said Jane during her natural life: and in case William should survive Jane, and there should be a child, or children, issue of the marriage then surviving, to pay and render to the said William after the death of Jane, and during his natural life, the said dividends, interest, etc. And after the several deceases of the said William and Jane, to divide and make partition of said purchase money equally among the children, issue of the said marriage, or in case there should be one child only, issue of the said marriage, to pay over to said child the whole of said purchase money, etc. And in case of the death of Jane, "without issue of that marriage," to pay over to the said William, his executors, etc., the said purchase money: and in case William and Jane should not make any appoint-

ment of a purchaser, etc., as aforesaid, then in trust to support the contingent remainders thereafter limited and mentioned, and to lease, demise, and to farm, let, etc., and to pay over the rents, profits, etc., to the said Jane during her natural life; and in case William should survive Jane, and there should be a child or children issue of the said marriage, then surviving, to pay over, etc., to William during his natural life: and after the several deceases of the said William and Jane, to well and sufficiently convey and assure to the children, issue of the said marriage the said lands and premises, *habendum* to said children, their heirs and assigns forever; or in case that there should be one child only issue of the marriage, to well and sufficiently convey, etc., to said child the whole of said lands and premises, *habendum* to the said child, his or her heirs and assigns forever. And in case of the death of Jane, without issue of that marriage, then to convey, etc., to William in fee, or to whom he might by will appoint. Statement.

The marriage was solemnized on the day the articles of agreement were executed.

Mrs. Lazier, as the survivor, claims the estate under the terms of the settlement.

On the other hand the defendant Ethel Jane Robertson, as the only child of Alexander, claims an interest in the said estate, as the representative and heiress of her father, notwithstanding the fact that her father, Alexander, died prior to the death of his mother, the said Jane Robertson.

By reason of the death of the parents, the period has arrived when the plaintiff, as trustee, is required to convey the estate to the party or parties entitled, and by reason of the conflicting claims, the plaintiff is unable to determine to whom he shall so convey, without the direction and assistance of the Court, and prays that the Court will construe the said marriage settlement and determine to whom the plaintiff should convey, and if more than one of the defendants be found entitled to determine in what proportions they are entitled, etc.

Argument. The motion was argued in Court on January 17th, 1899, before ROBERTSON, J.

E. G. Porter, for the plaintiff trustee, stated the case.

Armour, Q.C., for the defendant Lazier, the daughter. The intention was that there should be no vested interests in remainder. The only vested interests were those taken by the spouses, and the words, after the direction to sell and invest, etc., "and in case William and Jane should not make any appointment of a purchaser, etc., as aforesaid, then in trust to support the contingent remainders thereafter limited, etc.," shew that. The trustees held the whole estate, and there was no vesting until they conveyed at the proper time, and the contingency lasted until the death of both spouses. At the death of the survivor of the husband and wife, the land is to be conveyed to child or children, if any, surviving, and therefore the contingency as to who will take by the conveyance lasted up to the death of such survivor, therefore the survivor's child took here to the exclusion of all others. Grandchildren cannot take under the definition "children": *In re Dixon's Trusts* (1869), Ir. R. 4 Eq., at p. 12. Marriage articles may be liberally construed, but marriage settlements are always strictly construed: *In re Warren's Trusts* (1884), 26 Ch. D. 208. Where the gift is to a class, the class is ascertained when the distribution takes place: *In re Sir E. Harvey's Estate*, *Harvey v. Gillow*, [1893] 1 Ch. 570; and the exception in the Wills Act, R. S. O. ch. 128, sec. 36, only applies to children. The word "issue" includes children and grandchildren, but "children" is not so comprehensive: *Morgan v. Thomas* (1882), 9 Q. B. D., at pp. 645, 646; *Paradis v. Campbell* (1883), 6 O. R. 632; *Rogers v. Carmichael* (1892), 21 O. R. 658; *Murray v. Macdonald* (1892), 22 O. R. 557. The apt conveyancing words used in a marriage settlement are "children or remoter issue": 6 Bythewood's Precedents in Conveyancing, 4th ed. 546, and see p. 299.

W. H. Blake, for Ethel Robertson, the granddaughter,

contra. Alexander, the son, took a vested interest at his birth, or in any event, on his coming of age. In cases of settlements, if it can be inferred from the language used that all the children were intended to take, although there may be words which go to express that only those living at the death of the parent are to take, the Court will hold that those who attained twenty-one, even if they died before the parent, will take: *Elphinstone, Norton & Clark on the Interpretation of Deeds*, 402. All children will take unless the settlement distinctly provides otherwise. Here the expression "contingent remainder" has apparently slipped in by chance and nothing can be concluded from it, as no contingent remainder, as a matter of fact, is subsequently defined. The whole settlement shews how all the children's interests were safeguarded in all the different contingencies, and no where in the deed is anything found inconsistent with a vesting as contended for. It is not, as I contend, a question of survivorship. The leaning of the Court is in favour of a vesting in children. I refer to *Elphinstone*, 396-406, and cases there collected, of which the principal are: *Wakefield v. Richardson* (1883), 13 L. R. Ir. 17; *Jeyes v. Savage* (1875), L. R. 10 Ch., at p. 558; *Emperor v. Rolfe* (1848), 1 Ves. Sr. 208; *Re Wilmott's Trusts* (1869), L. R. 7 Eq., at p. 537; *Whatford v. Moore* (1836), 3 My. & Cr., at p. 270; *Tucker v. Harris* (1832), 5 Sim., at p. 543; *Wilson v. Duguid* (1883), 24 Ch. D. 244; and the following cases in our own Courts: *Gill v. Gilmour* (1887), 14 O. R. 129; *Parkes v. The Trusts Corporation of Ontario* (1895), 26 O. R. 494; *Webster v. Leys* (1881), 28 Gr. 475; *Town v. Borden* (1882), 1 O. R. 327; *Gairdner v. Gairdner* (1882), 10 O. R. 184; *Latta v. Lowry* (1886), 11 O. R. 517.

Armour, in reply. The cases cited by the other side are where portions were given to members of families which are more liberally construed than where the *corpus* is to be divided, or cases of vested remainders which do not apply here, as the settlor has here declared the remainder to be contingent.

Argument.

Judgment. March 3, 1899. ROBERTSON, J. :—

Robertson, J.

After a careful consideration of this instrument, I have come to the conclusion that the intention of the parties to it was that the trust property therein mentioned, should be conveyed by the trustees to the children issue of the marriage "after the decease of the said William Robertson and Jane Robertson."

The articles of agreement were ante-nuptial on which the settlement shortly after the marriage was executed, and whether the language is loose and ambiguous, in cases of settlements, if there is reason to collect from such language that all the children of the marriage were intended to take, then, although there may be words which go to express that those only shall take who shall be living at the death of the parent (which, in this case, would be the surviving parent, Jane Robertson), the Court holds that all the children who attained the age of twenty-one years, although they died in the lifetime of the parent shall take : *per* Shadwell, V. C., in *Tucker v. Harris* (1832), 5 Sim., at p. 543.

In *Whatford v. Moore* (1836), 3 My. & Cr., at p. 289, Lord Chancellor Cottenham, says : "In a case of doubtful construction upon the whole instrument, the Court leans to that which will include children so dying, as most convenient, and most likely to have been the intention of the parties."

In *Currie v. Larkins* (1864), 4 D. J. & S. 245, it was held that "in construing a pre-nuptial settlement it must be considered that the intention of the parties * * to it was to provide for the children of the marriage, etc., * * and, a construction which would exclude a son who attained twenty-one and afterwards died in the lifetime of his surviving parent, cannot be adopted *in the absence of words absolutely compulsory*." In his judgment the Lord Justice Knight-Bruce, said, at p. 253 : "Upon the construction for which the appellant contends, the son who attained majority and his family would have been equally

excluded, if that son, instead of dying a bachelor, had died Judgment. in his father's lifetime leaving a widow and children Robertson, J. surviving the father. Neither upon principle, nor upon authority, considering that the instrument was a pre-nuptial settlement, is it possible to adopt such a construction in the absence of words absolutely compulsory." Again he says, at p. 254: "Taking, as we must take, the whole of that instrument, * * from beginning to end together, an intention is not, in my judgment, exhibited to exclude a child who should attain his majority in the father's lifetime, although not surviving the father or mother." And Lord Justice Turner agrees to the foregoing and says, at p. 255: "I take it to be reasonably clear that upon the true construction of this settlement, if we look only to the first trusts which are declared in favour of the children, each child would take from its birth a vested interest; and the difficulty arises upon the clause which provides for the vesting" (as he points out), after the decease of the survivor of the father and mother.

Now, there can be no doubt whatever that the settlement now under consideration was intended by the parties to it to provide for the children, issue of the marriage, as I have already stated; and although there is no time fixed by expression in it, declaring when the vesting should take place, in my opinion that happened at the birth of each child, subject to a partial divesting, as each child was afterwards born, as was held in a case of money portions, in *Gill v. Gilmour*, by the Chancellor (1887), 14 O. R. 129, although they were not to enjoy it until after the death of the surviving parent, which does not interfere with the time of vesting in the absence of words to the contrary.

In *Wilson v. Duguid* (1883), 24 Ch. D. 244, there was a settlement of leasehold property which the settlor was entitled to for the residue of a term of ninety-nine years from midsummer, 1811. The deed of settlement bore date 21st May, 1833, and was made by Robert Keeling the elder, of the one part, and William Duguid and Robert Keeling the younger, of the other part. After reciting *inter alia*, that

Judgment. the settlor being desirous of making some provision for his daughter, Sarah Duguid, the wife of the said William Duguid and also for the said William Duguid and Robert Keeling, the younger, and otherwise as thereafter mentioned, had determined to assign the residue of the above mentioned term, and he the settlor assigned the said residue of said term to William Duguid and Robert Keeling, the younger, upon trust to pay the rents and profits to the said Sarah Duguid for her life, for her separate use; and from and after her decease, in the lifetime of her husband, William Duguid, to pay the same to him for life; and from and after the decease of the survivor of them, upon trust to assign the premises unto and amongst such of their children then living, in such manner, shares, and times, and proportions, as the said William and Sarah jointly, or the survivor of them separately, should by any writing appoint; and in case there should be no such child or children, then upon trust for the said Robert Keeling, the younger, for life; and after his decease upon trust to assign unto and amongst such of his children and in such manner, shares, times and proportions, as he should by any writing appoint. Sarah died in 1876, without leaving issue; William died in March, 1880; Robert Keeling, the younger, died in 1863, having been only once married, viz., in 1817, and having had ten children and no more. Of such ten children, three died before 1863; two after 1863 and before 1876; one after 1876 and before March, 1880, and one after March, 1880. Robert Keeling, the younger, never exercised the power of appointment.

The question was, what children of Robert Keeling, the younger, could take: whether all his children or those only who were living at his death, which occurred in 1863, or those only who were living at the death of Sarah in 1876, or those living at the time of the death of William her husband, who died in 1880. Chitty, J., in giving judgment, at page 248, says: "There is obviously a distinction between the trusts for the children of William and Sarah, and the trusts for the children of Robert; the

trusts for the children of William and Sarah being only Judgment.
 for those living at the death of the survivor, and those Robertson, J.
 words being omitted in the trusts for Robert Keeling, the
 younger."

"On the true construction of this settlement, so far as relates to the children of Robert Keeling, the younger, I hold there is a trust for all the children of Robert in equal shares, subject to a power of selection and distribution exercisable by him either by deed *inter vivos* or a testamentary instrument;" and there being no appointment, he held that all the children of Robert took as tenants in common in equal shares. I cannot distinguish that case from the one in hand.

Lambert v. Thwaites (1866), L. R. 2 Eq. 157, is referred to by Chitty, J., in *Wilson v. Duguid*, and followed. That was a case of post-nuptial settlement by which certain freehold property was conveyed to trustees upon trust to pay the rents to William and his wife during their lives, and to the survivor of them in manner therein mentioned "and from and immediately after the decease of the survivor of them, upon trust to make sale and to divide the proceeds amongst all and every of the children of the said William lawfully begotten, in such shares, etc., as he should direct by any will, etc. There were seven children, all alive at the date of settlement and all attained the age of twenty-one. Alfred, the eldest of these children, died 18th September, 1856, having made his will on 5th May, 1855, and thereby devised all his real and the residue of his personal estate to defendant Page and plaintiff Lambert, their heirs, etc., upon trust for the benefit of his wife and children, and appointed Page and plaintiff, executors. William died in May, 1862, without having executed the power of appointment, reserved to him by the settlement. The question was whether, in default of the execution of the power, the property was to be divided amongst the six children who survived the father, excluding Alfred, or among the seven inclusive of him. Sir R. T. Kindersley, V.-C., after reviewing a number of cases, declared that all

Judgment. the children, including Alfred, took in equal shares in Robertson, J. default of appointment."

In *Town v. Borden* (1882), 1 O. R. 327, testator by his will "as touching his worldly estate," gave to his wife the use of all his personal property and of his farm and buildings for her support and the bringing up of his children, "and at her decease the whole of the personal and real property to be equally divided between my six children." Four of the children predeceased the wife, their mother, and the question was, whether the shares vested on the death of the testator or not till the death of the tenant for life. Held, that the shares of the children vested on the death of the testator. In the case here, the vesting did not take place until the children were born.

The trust here is, after the several deceases of the said William and Jane, to well and sufficiently convey and assure to the children issue of the marriage, the said lands, etc., or in case there should be one child only, issue of the said marriage, to well and sufficiently convey and assure, etc., to the said child, etc. There is nothing to indicate that in case any of the children should die before the tenant for life, that the survivor only should take to the exclusion of the child of a deceased child, issue of the marriage. The words "in case there should be one child only, issue of the said marriage," clearly mean "one child born, issue of the marriage," and do not mean one child only surviving at the time of the death of the surviving parent.

Mr. Armour pointed out that "in case the said Jane Robertson and William Robertson do not make any appointment of a purchaser or purchasers" as provided, the settlement itself declares that the trustees are to hold "in trust to support the contingent remainders hereinafter limited," etc., and that such expression used by the parties to the settlement was conclusive, that the remainders were not to be vested, etc. To this I cannot agree. At the time of the settlement there were no child or children, and the remainder was contingent upon a child or children,

issue of the marriage, being born ; if none, then the estate Judgment.
 was to be conveyed, etc., to William, *habendum* in fee, or Robertson, J.
 to such person or persons as he by his last will, etc., should
 appoint. There is nothing in this to shew that, if a
 child or children were born, that the remainder should not
 vest until after the death of the survivor ; and as the
 several cases referred to by me declare no such conclusion
 can be arrived at in the absence of words compulsory to
 that effect, I cannot give effect to his contention.

Upon giving the case the best consideration I am capable
 of, and after consulting and considering not only all the
 cases cited, but a host of others, and keeping in mind the
 injunction of the several eminent Judges whose language
 I have quoted, that there must be words which make it
 compulsory that no child unless he or she survives both
 parents shall take, I can come to no other conclusion than
 that at the birth of each child he or she took a vested
 interest ; and there being two such children, one of whom
 died after the death of his father, but predeceased the
 surviving mother, leaving him surviving an only child, the
 defendant, Ethel Jane Robertson, she is, in my judgment,
 entitled to a moiety of the estate as heiress-at-law of her
 deceased father, Alexander, and that the defendant Mar-
 garet, the surviving child, issue of the marriage of William
 and Jane, is entitled only to the other moiety.

I should state, with reference to the contention of Mr.
 Armour, that " children " never includes " grandchildren "
 in a marriage settlement : I think the expression is too
 wide.

Several cases were cited, however. *Alexander v. Alex-
 ander* (1755), 2 Ves. Sr. 639, was a case in reference to a
 power of appointment of a fund among children begotten
 by the testator on his wife, under a will bequeathing a
 sum of money which contained a power in these words :
 " And I give unto my said wife the absolute disposal of
 the said sum of £6,000 unto and among such children
 begotten between us, and in such proportions as she shall
 by last will and testament or any other deed, etc., in her

Judgment. lifetime * * direct, limit and appoint." Sir Thomas Robertson, J. Clarke, M.R., held that an appointment to grandchildren was not a good appointment. There was no vesting there, of course, and the wife could have appointed a much larger sum to one child than to another, so long as the lesser were not illusory. I do not see, therefore, how that affects the case in hand. There are other cases, however, which shew that "children" does not extend to "grandchildren," but the facts and circumstances are different from this one.

In re Dixon's Trusts (1869), Ir. Rep. 4 Eq. 1, the word "issue" gave rise to the case. Vice-Chancellor Chatterton, held that "issue" included "grandchildren," and there being two children only, born of the marriage, one of whom had children living at the death of the tenant for life; and that such last mentioned children, being children of a child of the marriage of the tenant for life and her husband, took as tenants in common with their parent, and were entitled with him to share *per capita* in one-half of the estate. On appeal this was reversed and it was held that the word "issue" in this settlement meant "children," and, therefore, that the children of the marriage took the fund, in default of appointment, to the exclusion of the grandchildren, being children of a child who still lived. It appeared, also, that the other child of the marriage had not been heard of for many years, and it was supposed, and there was some evidence to shew, that he had died unmarried in New Orleans, in 1854, thirteen years before the death of his mother, and his moiety was retained (the trustees having paid the fund into Court under the Trustee Act) pending inquiries of the brother of the claimant, or his representatives, which suggests to my mind, that if he had died leaving children him surviving at the time of the death of the life tenant, they would be entitled to the other half. It certainly did not decide that the claimant would be entitled to the whole of the fund had the absent brother left children him surviving; so that case only decides, as before stated, that the word "issue" in that settle-

ment meant "children" issue of the marriage referred to Judgment.
therein.

Robertson, J.

Here no such question arises, because the words used are "children issue of the said marriage." I might note here that in *In re Dixon's Trusts*, the Lord Justice of Appeal, in his judgment, at p. 12, decided that the word "issue" in a marriage settlement is always used as a synonym for children, because grandchildren or great-grandchildren are never thought of on such occasions as objects of independent provision, whereas in a will when a testator makes a gift or a limitation to the issue of another, there is nothing in the nature of the occasion of itself to suggest any restriction upon the presumptively indefinite signification of the word "issue." But this is dissented from in the late case of *Hobbs v. Tuthill*, [1895] L. R. 1 Ir. 115, and it was there held that the word "issue" occurring in a marriage settlement *prima facie* includes all descendants, and in the absence of some controlling or explanatory context is not to be restricted to children only.

In re Sir E. Harvey's Estate, [1893] 1 Ch. 567, referred to by Mr. Armour, I do not think is authority for holding as he contends. That was a trust created by a will. At p. 570, Chitty, J., says: "A gift by will to a class is taken, in law and equity, to be a gift, where it is immediate, to those only who survive the testator, and, where it is not immediate but postponed, to be a gift to those only who survive the testator, or come into being before the period of distribution. Take gifts to children: when the gift is to a child named, and he dies in the testator's lifetime, it fails to take effect, apart from the 33rd section of the Wills Act. The reason of its thus lapsing is found in the ambulatory nature of a will, which does not come into operation until the testator's death; a deceased person cannot take under a will, just as a deceased person cannot take under a deed which has an immediate operation."

In the case before me there were no children at the date of the deed of settlement, but at the death of William Robertson there were two children him surviving, in

Judgment. whom, in my opinion, the estate in remainder had vested, Robertson, J. although not to come into possession until after the death of Jane Robertson; and that the remainder was to go to issue of the marriage is clear from the provision which is made in case of the death of Jane before William "without issue of that marriage," in which case it was to revert to William, but it was only to revert to him in case there was no issue of the marriage.

And here it will be observed that the word "children" is not used, but "issue," which is a factor to shew that the remainder was not intended to be limited to a surviving child. The word "issue" occurring in a marriage settlement *primâ facie* includes all descendants: *Hobbs v. Tut-hill*, L. R. (1895) 1 Ir. 115; and although in other places the words are "children, issue of the said marriage," I think it is open to be concluded that "issue" was meant throughout; at all events, a grandchild is "issue of the marriage" in this case: and I can come to no other conclusion than that every child born of that marriage was intended to take in remainder "after the several deceases of the said William Robertson and Jane Robertson," and, if I am right in that, the child of the son Alexander is entitled to his share as tenant in common with Mrs. Lazier, the only other child of William and Jane, as tenants in common.

The defendant Ethel Jane Robertson alleges that her deceased father, Alexander Robertson, made his will and appointed John Parker Thomas, and Anson Gilbert Northrop, his executors and trustees; that Northrop renounced, and letters probate were granted to Mr. Thomas, who is now the sole personal representative of the said estate, and she submits that he is a necessary party to this action, etc. I think that is the case, and, therefore, Mr. Parker must be joined for the purpose of taking the accounts in the Master's office.

This defendant also alleges that the said late Jane Robertson also made her last will and appointed her, the said Ethel Jane Robertson, her executrix and trustee; that she has proved the will, and is now the sole personal repre-

sentative of the said Jane Robertson, deceased ; and that Judgment.
she is entitled to an account of the dealings of the plaintiff Robertson, J.
with the property under the said marriage settlement, and
to an order for payment over of any balance which may be
found to be in his hands.

I think there is no doubt that defendant Ethel Jane, as
the executrix, etc., of the deceased Jane Robertson, is
entitled to an account and the whole matter must be
referred ; but, owing to the fact that the plaintiff is the
Master at Belleville, where the accounts of right should
be taken, I will postpone naming the referee in order to
give the parties an opportunity of agreeing to some proper
person who will go to Belleville to take the evidence, etc.
In case of non-agreement, then I will refer to such a referee
who can take the accounts with the least expense.

G. A. B.

CLARK V. BELLAMY ET AL.

Executors and Administrators—Setting Apart a Fund—Non-existence of—Fraud of Solicitor—Negligence of Executor—Representation by—Agency of Solicitor—Representations and Payments by—Statute of Limitations.

Executors relying upon the word of a solicitor who had managed the testator's affairs in his life-time, procured from him a list of mortgages alleged to have been taken by the testator, representing a trust fund of \$5,000 set apart by the will for the widow, but without the actual production of the mortgages, and showed it to her, informing her that the solicitor would pay her the interest. As a matter of fact the mortgages never had any existence, but the solicitor regularly paid her the interest up to the time of his death :—

Held, that the executors had neglected their duty in not setting aside the \$5,000 in money or securities, and that their duty in that respect could not be delegated :—

Held, also, that they had appointed the solicitor their agent for the purpose of paying the interest, and that statements and payments made by him were made in the course of the business for which they had employed him ; that each payment was a renewal of the representation that the \$5,000 was still in their hands, invested for her benefit ; and they could not be allowed to set up the Statute of Limitation in answer to the plaintiff's claim, or that the statements they made were not true, and that they were liable to make the fund good.

Statement. THIS was an action by the widow of a testator, who was a beneficiary under his will, against his executors for an accounting with reference to a trust fund under the circumstances set out in the judgment, from which the following statement is taken :—

The plaintiff is the widow of one Thomas Clark, deceased, and the defendants are the executors of his last will and testament.

The testator by his will directed his executors to invest \$5,000 of his estate in mortgages of real estate, and to pay the interest to his widow, the plaintiff, during her life, and to divide the principal at her death among his children in the proportions which he prescribed. The remainder of his estate he directed his executors to divide amongst his children upon his decease.

The testator died in February, 1889, and his executors duly proved his will.

They were farmers, and employed one Badgerow, a

solicitor who had been employed by the testator to manage his affairs in his lifetime, to manage the affairs of the estate. They had implicit confidence in Badgerow, and left everything connected with the estate in his hands. Statement.

On 8th March, 1890, the executors met the persons entitled to the estate, other than the above mentioned \$5,000, at Badgerow's office in Toronto; he read what purported to be a statement of the moneys and securities in his hands, and paid over to the persons entitled some \$6,000 in cash, and they went away.

After they had gone Bellamy, one of the executors, remained, and at his request Badgerow gave him a list of mortgages amounting to \$5,000, and stated that the \$5,000 reserved for the plaintiff was invested upon these mortgages. Bellamy did not verify the statement in any way, but fully believing it to be true, took the list away with him and shewed it to the plaintiff upon the same evening, telling her that these mortgages had been set apart for her by the executors according to the will; that they were in Badgerow's hands, and that he would collect and pay over the interest to her.

From that time forward, Badgerow paid her periodically sums amounting to \$300 a year as the interest upon these investments until 1st May, 1892, when the last payment was made by him. During all this time the executors took no part whatever in the management of the estate, and made no inquiries as to the investments so far as appears.

Badgerow died in July, 1892, and it was discovered by the executors in the autumn of that year that the supposed mortgages had never had any existence whatever, as securities belonging to the estate; that he had never invested the \$5,000 for the estate in any securities, and had probably made away with it before the death of Thomas Clark, the testator.

An unregistered mortgage, executed by Badgerow and his wife to the executors for \$5,000, dated 27th January,

Statement. 1891, was found among his papers, covering his house in Toronto, but subject to a large previous mortgage. Some litigation took place between the executors and the widow of Badgerow as to their rights under this mortgage, pending which the property was sold and a settlement of the claim of the executors against the land covered by the mortgage was arrived at, the result of which was that \$500 was paid to the present plaintiff, the widow of Thomas Clark, out of the proceeds of the sale of the land, and the balance was paid to Mrs. Badgerow and to the solicitors for the executors for their costs.

The executors proved for the \$5,000 against Badgerow's estate, which was insolvent, and received in dividends about \$700, which they have invested, and the interest of which has been paid to Mrs. Clark from time to time.

This action was brought on 10th June, 1897, by the widow of Thomas Clark alleging that the defendants had lost the \$5,000 less the amount recovered by way of dividends upon Badgerow's estate, by their breach of trust and negligence, and asking that they be removed from their trust and other trustees appointed in their place, and that they be ordered to pay to the plaintiff the arrears of interest upon the \$5,000, and to make good to the trust the principal sum lost through their breach of trust.

The defendants set up by their defence that they had been induced to act by the promise and representation of the testator that they should be relieved of all trouble in regard to the estate by the fact that his affairs were to be left by them in the hands of Badgerow, in whose hands he desired they should be left. That in accordance with this request they left the affairs of the estate in Badgerow's hands, and did not discover his fraud until after his death, and that they have fully administered the estate which came to their hands. They set up the Statute of Limitations and the Trustees Act of Ontario, and ask for an administration of the estate and an order requiring the other persons who had shared in the estate to make good the loss.

The action was tried before STREET, J., at Toronto, Argument. without a jury, on February 21st and 22nd, 1899.

Clute, Q.C., and *E. J. B. Duncan*, for the plaintiff, referred to *Low v. Gemley* (1890), 18 S. C. R. 685; *Re Gabourie*, *Casey v. Gabourie* (1887), 13 O. R. 635; *McCarter v. McCarter* (1884), 7 O. R. 243; *Wilson v. Moore* (1832), 1 My. & K. 126; *S. C.* (1834), 1 My. & K. 337; *Ex p. Norris*, *In re Biddulph* (1869), L. R. 4 Ch. 280; *Wedderburn v. Wedderburn* (1837), 4 My. & Cr. 41; *Munch v. Cockerell* (1839), 5 My. & Cr. 178; *In re Cross*, *Harston v. Tenison* (1881), 20 Ch. D. 109, at p. 122; R. S. O. ch. 129, sec 32, sub-sec. 1a; and contended that here a representation was made that the fund was invested in certain named mortgages which distinguished this case from *In re Somerset*, *Somerset v. Earl Poulett*, [1894] 1 Ch. 231.

S. H. Blake, Q.C., and *St. John*, for the defendant Riseborough, an executor, referred to *In re Somerset*, *Somerset v. Earl Poulett*, [1894] 1 Ch. 231; *In re Speight*, *Speight v. Gaunt* (1883), 22 Ch. D., at pp. 743, 746; *S. C.* (1883), 9 App. Cas. 1; *Bacon v. Bacon* (1800), 5 Ves. 331; *Mitchell v. Ritchey* (1865), 11 Gr. 511; *In re Brier*, *Brier v. Evison* (1882), 26 Ch. D. 238; *Churchill v. Hobson* (1713), 1 P. Wms. 241; *Stephens v. Beatty* (1895), 27 O. R. 75; *Thorne v. Heard & Marsh*, [1895] A. C. 495; *Howe v. Earl Winterton*, [1896] 2 Ch. 626, at pp. 639, 640; *In re Page*, *Jones v. Morgan*, [1893] 1 Ch. 304; *In re Swain*, *Swain v. Bringeman*, [1891] 3 Ch. 233; *In re Bowden*, *Andrew v. Cooper* (1890), 45 Ch. D. 444; *Lewin on Trusts*, 9th ed. 269.

W. E. Middleton, and *R. T. Harding*, for the defendant Bellamy, an executor, referred to *In re Chapman*, *Cocks v. Chapman*, [1896] 2 Ch. 763; *Fry v. Tapson* (1884), 28 Ch. D. 268.

Clute, in reply, referred to *Blair v. Bromley* (1846), 5 Ha. 542; *Kerr on Fraud*, 1st ed., p. 247; *Moore v. Knight*, [1891] 1 Ch. 547; *Carr v. London & North-Western R. W. Co.* (1875), L. R. 10 C. P., at p. 317; R. S. O. ch. 129, sec. 32.

Judgment. March 15th, 1899. STREET, J. :—

Street, J.

The precise breach of trust relied on by the plaintiff is that the defendants did not, as directed by the will, set aside \$5,000 to be invested for her benefit.

This should have been done on 8th March, 1890, when the executors, in Badgerow's office, paid over to the beneficiaries then entitled to the balance of the estate, a larger sum than \$5,000 as being such balance.

Instead of setting aside this sum of \$5,000, the defendants delegated to Badgerow the duty of doing it, and accepted without investigation or any precaution whatever, his statement that he had in his hands for them, securities representing the sum in question ; a statement which was absolutely untrue.

I think the executors cannot excuse themselves for having neglected their duty to set this sum aside either in money or securities, and that their duty in this respect could not be delegated to another. It is, however, argued that the breach of trust in question occurred on 8th March, 1890, and that the claim of the plaintiff in respect of it became barred, under the Trustee Act, at the end of six years from that date, whereas this action was not begun until 10th June, 1897.

The defendants appointed Badgerow their agent to manage and invest the \$5,000, to collect the interest on it and to pay it to the plaintiff. They told the plaintiff they had done so, and that Badgerow would from time to time, on their behalf, pay to her the interest upon the money which they told her he had invested for them.

Accordingly, Badgerow sent her quarterly cheques on the face of many of which the statement appears that it was for interest on this sum of \$5,000, which never had any real existence in his hands at all after the 8th March, 1890.

Badgerow had been appointed by the defendants their agent, to pay to the plaintiff the interest on this fund, and the statements made by him, and the payments made by

him, were made by him in the course of the business for which they had employed him. Each payment was a renewal of the representation originally made by them to the plaintiff, that a sum of \$5,000 was in their hands for her benefit, that it had been duly invested and that the payment was interest collected upon it.

Judgment.
Street, J.

The plaintiff relied upon the statements made to her and received the payments made to her in the full belief that they represented the interest upon the investments which the defendants told her had been made for her benefit of the \$5,000. Under these circumstances and entirely apart from any question of any Statute of Limitations the defendants cannot be allowed to set up as an answer to the plaintiff's claim that the statement they made was not true. It was a statement, the truth of which it was their duty to know: it was only because they had neglected their duty that they believed it to be true: they made it intending that the plaintiff should believe it and act upon it, and she did believe it and act upon it.

If they had ascertained the truth as their duty required them to do in March, 1890, and had then told her that the money was gone, she would naturally have then called upon them to make it good, and time did not begin to run against her until she became aware that their statements were untrue which was not until after Badgerow's death: *Bate v. Scales* (1806), 12 Ves. 402; *Blair v. Bromley* (1847), 2 Phillips 354, at p. 360; *S. C.* (1846), 5 Ha. 542, at pp. 556, 558; *Seton, Laing & Co. v. Lafone* (1887), 19 Q. B. D. 68; *Moore v. Knight*, [1891] 1 Ch. 547.

There must, therefore, be judgment upon the basis of an investment of the \$5,000 in question in March, 1890, at six per cent. with proper credits; the defendants are only chargeable with interest on the money obtained from the dividends on Badgerow's estate at the rate actually realized by them, and that money is to be treated as a part of the principal sum. The plaintiff should be charged with the money paid to her out of the proceeds of the sale of Badgerow's house as a payment on account of interest

Judgment. made by the defendants to her. The defendants should pay into Court forthwith the \$5,000, and should pay to the plaintiff the balance of interest due her to date, and they must of course pay the costs of the action. The calculation of the amount due the plaintiff is so simple that a reference should be unnecessary.

Street, J.

G. A. B.

THE WATEROUS ENGINE WORKS CO., LIMITED

v.

PRATT.

Contract Under Seal—Execution by One Party—Acceptance by the Other Party—Revocation—Damages.

A contract sealed and delivered by one party, which is subject to the approval of the other party, cannot be revoked by the former before the latter has had a reasonable time within which to signify his assent.

Nominal damages only allowed against the defaulting party under the circumstances set out in the report.

Statement. THIS was an action to recover the price of an engine with tools and belting, manufactured by the plaintiffs for the defendant.

The facts are stated in the judgment.

The action was tried at Toronto on the 7th of March, 1899, before MACMAHON, J., without a jury.

Aylesworth, Q.C., for the plaintiff company referred to Anson on Contracts, 8th ed., pp. 31, 32; Blackburn's Contract of Sale, 2nd ed., pp. 485-87; *Cort v. Ambergate, etc., R. W. Co.* (1851), 17 Q. B. 127; *Dunlop v. Grote* (1845), 2 C. & K. 153; *Frost v. Knight* (1870), L. R. 5 Ex. 322; and *S. C.* (1872), L. R. 7 Ex. 111; Sedgwick on Damages, 8th ed. pars. 613, 753; Mayneton Damages, 5th ed., 55.

Argument.

Shepley, Q.C., for the defendant, referred to *Mayne on Damages*, 4th ed., pp. 160; *Boorman v. Nash* (1829), 9 B. & C. 145, and cases there cited; *Pollock on Contracts*, 6th ed., pp. 47, 48.

March 17, 1899. MACMAHON, J.:—

I find in this case that when the contract was signed there was a seal attached to it. Two contracts were entered into at the same time, one contract with Macpherson, Hovey & Co., the blank form of which had seals attached to it when it reached the hands of that company's agents at Barrie. The blank forms sent by the plaintiffs had no seals attached to them when they reached their agents hands, but the district agent, Mr. Ward, says he always carried seals for the purpose of attaching to contracts he was securing for his principals, and he thought the seal was attached at the time the defendant signed the contract sued on; and Mr. Hughes said that he saw the seal on the document at the time of its execution by Pratt.

Taking this evidence, and the statement of the defendant himself, that he could not swear that the seal was not attached when he executed the document, and also having regard to the fact that the affidavit of execution was sworn to on the same day and sent by Mr. Ward to the plaintiffs, I reach the conclusion that the contract had the seal attached when signed by Pratt.

On the 12th April (the contract having been entered into on the 31st March), the defendant telegraphed the plaintiffs cancelling the contract, stating that he did not intend to take the machine. He was notified at once that the plaintiffs would not agree to its cancellation, and that they intended holding him to its terms.

It is not necessary to refer to the after correspondence which took place, except to say, that at the end of June, when under the contract the engine was to be shipped by the plaintiffs, they notified him that it was ready for shipment, and sent him the notes to be signed.

Judgment.

MacMahon,
J.

It is not in evidence whether the plaintiffs' workmen had commenced to build the engine prior to the 12th April or not. Mr. Mair, the accountant of the company, said that as a usual thing such contracts when received were passed on to the machine shop to be proceeded with; but that sometimes the precaution was taken of ascertaining before the work was commenced, whether the proposed purchaser was a man of substance—that is, whether he was a man capable of paying for the article ordered.

However, the plaintiffs went on and manufactured the engine under the contract; it was ready for delivery at the time stipulated for, and the company would have forwarded it to the defendant except for the express statement contained in a letter from him, through his solicitor, that he would not accept it if it was forwarded.

The engine was sold by the plaintiff company, but Mr. Mair said he could not state positively when the sale took place. As a rule the company did not keep these engines in stock, and when the engine manufactured for the defendant was sold there would certainly be some record shewing the time of its sale and the party who became the purchaser. Mair was not certain whether it was in the possession of the plaintiffs on the 11th July, 1894, although he was aware a sale had taken place, and that when sold there would be no reduction in the price from that agreed to be paid by the defendant for it.

The question as to the right of the defendant to cancel the contract, and the question of damages (assuming the plaintiffs are entitled to recover), will have to be considered.

Since making the above findings, I have examined the authorities referred to by counsel, and am confirmed in the view I entertained, and expressed, during the trial, that the contract being sealed and delivered by the defendant (although subject to the approval of the plaintiff company) could not be revoked by him as in the ordinary case of an offer made, which could be revoked before acceptance.

The law on the subject is thus stated in Pollock on Con-

tracts, 6th ed., pp. 7-8: "A promise * * if made by deed is at once binding and irrevocable. * * It is a settled part of the law of England (*Xenos v. Wickham* (1886), L. R. 2 H. L. 296, 323). It will not do to say that the contract is complete when the other party knows of the promise and assents; for if that were so, it could in the meantime be revoked. * * In truth the operation of a deed in matters of property has been anomalously extended to matters of obligation." And at pp. 47-8, the author says: "The ordinary rules of proposal and acceptance do not apply, * * to promises made by deed. It is established by a series of authorities which appear to be confirmed by the *ratio decidendi* of *Xenos v. Wickham*, in the House of Lords, * * ; that a promise so made is at once operative without regard to the other party's acceptance. It creates an obligation which whenever it comes to his knowledge, affords a cause of action without any other signification of his assent, and in the meantime it is irrevocable. Nearly all the cases, it is true, were on instruments involving matter of conveyance as well as of contract, but no distinction is made or suggested on that ground. The general principles of contract are, however, respected to this extent, that if the promisee refuses his assent when the promise comes to his knowledge, the contract is avoided."

Judgment.
MacMahon,
J.

In the present case the plaintiffs signified their assent within a reasonable time.

Then as to the question of damages. In *Dustan v. McAndrew* (1870), 44 N. Y. 72 (cited in Sedgwick on Damages, 6th ed., sec. 753), the Court said, at p. 78: "The vendor of personal property in a suit against the vendee for not taking and paying for the property, has the choice ordinarily of either one of three methods to indemnify himself. (1) He may store or retain the property for the vendee, and sue him for the entire purchase price. (2) He may sell the property, acting as the agent for this purpose of the vendee, and recover the difference between the contract price and the price obtained on such resale ;

Judgment. or (3) He may keep the property as his own, and recover
MacMahon, the difference between the market price at the time and
J. place of delivery and the contract price."

By the terms of the contract the property in the engine was not to pass to the defendant until the whole of the purchase money was paid. The company, being in possession of and having the title in the engine, resorted to the second method mentioned in *Dustan v. McAndrew* (1870), 44 N. Y. 72, for the purpose of indemnifying itself by selling the property as the agent of Pratt, and obtained the same price that Pratt had contracted to pay.

The company was put to some trouble and inconvenience by the action of the defendant in refusing to accept the engine, but the damage suffered was merely nominal, and I assess them at the sum of ten dollars, for which there will be judgment and costs on the Division Court scale. It is not a case in which the defendant should be allowed to set off costs.

G. A. B.

BURTON V. DOUGALL.

Deed—Mortgage of Land—Mistake in Name of Mortgagee—Void Conveyance—Legal Title.

In a mortgage which was intended to be taken in the name of the mortgagee, she, by mistake, was described by a name which was not her real name, and which was one she had never assumed or been known by :—

Held, that the legal estate did not pass to her by the mortgage whatever its operation in equity ; and that she could not make a good legal title to a purchaser under the power of sale contained in the mortgage.

THIS was an appeal from the report of an official referee Statement.
as to title in an action for specific performance.

The facts of the case are stated in the judgment.

The appeal was argued in the Weekly Court on January 12th, 1899.

W. R. Riddell, for the plaintiff appellant, contended that the mortgage was really one to Mary Jane Burton, just as it would have been, under the authorities, if she had assumed the name of "Clara Benton": *Amer. & Eng. Encycl. of Law*, 2nd ed., vol. 9, p. 134; *Geddes v. Toronto Street R. W. Co.* (1864), 14 C. P. at p. 519; *Janes v. Whitbread* (1851), 11 C. B., at p. 413; *Wallbridge v. Jones* (1872), 33 U. C. R. 613; *Boyce v. Danz* (1874), 29 Mich., 146; *Newton v. McKay* (1874), 29 Mich. 1; *Wallace v. Souther* (1888), 16 S. C. R. 717; *Re Clarke and Chamberlain* (1889), 18 O. R. 270; *Williams v. Bryant* (1839), 5 M. & W., at p. 450; Sugden on Real Property, 14th ed., par. 17; *Scanlan v. Wright* (1833), 13 Pick. 523; *Jackson v. Stanley* (1813), 10 Johns. (N.Y.) 132. *Crawford v. Spencer* (1851), 8 Cush. 418 on which the referee relied was clearly distinguishable.

Douglas, for the defendant, contended that this was not a case of a fictitious name; that where an intended grantee was described by another name by mistake, not intending to call him by that name, the deed was void, unless the

Argument. grantee was commonly known by the name in the deed or unless there was something else in the deed to identify the person intended: Sheppard's Touchstone, at p. 236; *Humble v. Glover* (1567), Cro. Eliz. 328; *Dr. Ayray's case* (1613), 11 Rep. 21a; Coke on Littleton, p. 3a; Davidson's Precedents, 3rd ed., vol. 1, p. 39; Devlin on Deeds, vol. 2, pp. 183-86; *Jackson v. Stanley* (1813), 10 Johns. 132; Elphinstone on the Interpretation of Deeds, p. 126. Whether a person exists of the name of the grantee or not is immaterial. The plaintiff might have an equity to reform, but she had not even an equitable title.

Riddell, in reply, referred to Amer. & Eng. Encycl. of Law, 2nd ed., vol. 7, p. 688; *David v. The Williamsburg City Fire Ins. Co.* (1880), 83 N.Y. 265; *Couden v. Clerke* (c. 1619), Hob. at p. 32; *Erskine v. Davis* (1861), 25 Ill. 251; *Garwood v. Hastings* (1869), 38 Cal. 217; *Petition of John Snook* (1859), 2 Hilt. C. P. 566.

March 4th, 1899. MEREDITH, C. J.:—

This is an appeal by the plaintiff from the report of an official referee (Cartwright) against the plaintiff's title in an action for specific performance.

The referee has reported that the title to the lands in question did not pass to the plaintiff by the mortgage from Abraham Major to Clara Benton, dated June 12th, 1890, under the power of sale in which the plaintiff sought to make title, and that neither the conveyance from the mortgagor to the plaintiff, dated November 24th, 1896, nor the reference to the mortgage as a mortgage to the plaintiff in the conveyance of the equity of redemption from the mortgagor to Maxime Major was sufficient to enable the plaintiff to make a good title to the lands in question.

The circumstances of the case are peculiar: Messrs. Ellis & Ellis, of Windsor, were the solicitors for the plaintiff, and an application having been made to them by the mortgagor, Abraham Major, for a loan of \$1,200 upon the

lands in question, a blank form of application for the loan appears to have been prepared, and the words "for Clara Burton" were inserted in the form of the valuator's report which was annexed to the application by Mr. Henry Ellis. Mr. Ellis explains that he believed the plaintiff's name to be Clara Burton, and under that belief inserted that name in the valuator's report, intending by it to designate the plaintiff. The mortgage was prepared by the other member of the firm who mistook the words "Clara Burton" for "Clara Benton," and accordingly inserted the latter as the name of the mortgagee in the instrument which was executed without the double mistake that had been made being discovered.

The mortgagor subsequently, on July 7th, 1892, conveyed the lands in question to Maxime Major. The conveyance is in the short form, and following the release clause it contains a provision by which the grantee assumes "the mortgage on the said property made by the party of the first part and his wife Philomine Major to Mary Jane Burton, dated the 12th day of June, 1890, for \$1,200, and also * * and covenants to pay the same as part of the purchase money herein, and covenants to save harmless the party of the first part from the payment of the same and all costs and expenses connected therewith," but the conveyance is not executed by the grantee.

By indenture dated November 24th, 1896, after reciting the agreement by the plaintiff to lend to the mortgagor the \$1,200 on the security of a mortgage of the lands in question, the execution of the mortgage of June 12th, 1890, and that the name of the mortgagee was written therein by error as Clara Benton instead of Mary Jane Burton, the mortgagor and his wife confirmed the "mortgage and the grant and conveyances therein to the said Mary Jane Burton," and the mortgagor granted and conveyed the lands in question to the plaintiff.

It is not open to question that if the referee's conclusion that the land did not pass to the plaintiff by the mortgage is a correct one, he was right in holding that neither the

Judgment.

Meredith,
C.J.

Judgment.
Meredith,
C.J.

provisions of the deed from the mortgagor to Maxime Major, to which I have referred, nor the deed of confirmation were sufficient to enable the plaintiff to make a good title.

Even if the grantee Maxime Major had executed the deed from the mortgagor to him, it would not have got rid of the difficulty in the plaintiff's way, that difficulty being that the legal title remained in the mortgagor, notwithstanding the execution of the mortgage. The right of the plaintiff in equity to have the mistake remedied and the land properly conveyed is clear, but the purchaser is not, of course, bound to accept a merely equitable title, and the deed of confirmation is ineffectual for the reason that before the execution of it the legal estate in the land had passed to Maxime Major by the conveyance to him from the mortgagor.

There remains, therefore, to be considered only the question as to the effect of the mortgage deed.

It is said in Sheppard's Touchstone, p. 236: "Where a deed doth intend to describe the person of the grantee by his proper name, and doth omit or mistake his Christian name or surname: in this case, for the most part, the grant is void, unless there be some special matter to help it as in the cases before."

In *Williams v. Bryant* (1839), 5 M. & W., at p. 456, Baron Parke, referring to the case of *Hyckman v. Shotbolt* (1569), Dyer 279, cited to shew that the variance of name in that case was fatal, pointed out that that was because the wrong name in the bond (John instead of William) was said to have been inscribed by mistake, and therefore it was to be presumed was not a name by which he was known. And that I take it is the real test. If the name by which the grantee is described is either his real name or, though not his real name, that by which he is known, and probably even a name assumed for the purpose of the transaction to which the deed relates, the deed is valid, but if it be intended to describe the grantee by his proper name and a wrong name is inserted by mistake, I think the deed is inoperative.

In the present case it was intended to describe the mortgagee by her proper name, and the name Clara Benton was neither a name which the plaintiff had assumed, nor one by which she was known, but was inserted by mistake, and I am therefore of opinion that the mortgage was inoperative, except in so far as it operated in equity. I am unable to see any practical difference between this case and one in which a blank has been left where the name of the grantee should appear.

The ruling of the referee must therefore be affirmed, and the appeal dismissed with costs, but if the plaintiff desires to have a reference back to enable her to complete her title, either by a conveyance from the person in whom the legal estate in the land is vested or otherwise, the case may be spoken to on that point.

A. H. F. L.

Judgment.
Meredith,
C.J.

TOWNER V. THE HIAWATHA GOLD MINING AND MILLING COMPANY OF ONTARIO.

Company—List of Shareholders—Duplicate List of Shareholders—Penalty—R. S. O. ch. 191, sec. 79—Moderation of.

A list of shareholders transmitted to the Provincial Secretary contained the name of a person as holding a certain amount of stock in a joint stock company, while in the list posted up in the head office of the company the shareholder's name was inadvertently deleted:—

Held, that the lists were not duplicates within the meaning of R. S. O. ch. 191, sec. 79, the Ontario Companies Act, and that the company were liable to a penalty under the Act.

Circumstances considered in moderating the amount of penalty.

THIS was an action against the company for penalties under the Ontario Companies Act, R. S. O. ch. 191, on the grounds mentioned in the judgment. Statement.

The action was tried at Toronto, on February 28th, 1899, before BOYD, C., without a jury.

DuVernet, for the plaintiff, referred to *Atkin & Co. v. Wardle* (1889), 61 L. T. N. S. 23.

Argument.

Cameron, for the defendant, contended that there had been a substantial compliance with the statutory requirements: *The Queen v. Newton* (1879), 48 L. J. Mag. 77; *In re Briton Medical and General Life Association* (1888), 37 W. R. 52.

March 6th, 1899. BOYD, C.:—

One branch of this case turns on the meaning of "duplicate" used in the penalty clause, sec. 79, R. S. O. ch. 191. That term is defined thus by Maule, J., in *Toms v. Cumming* (1845), 8 Scott N. R., at p. 917: "The true definition of the term 'duplicate' is a document which is the same in all respects as some other instrument, from which it is indistinguishable in its essence and in its operation." It is perhaps a more exacting word than "copy," or even than the term "true copy," for in these there may be more or less variation from the original. Even with latitude of construction a duplicate must bear the meaning of a document identical with another in all essential respects: *Lewis v. Roberts* (1861), 11 C. B. N. S., at p. 29. One of the essentials of the summary required by the Act is the list of persons who are shareholders. This summary is to be in duplicate, *i.e.*, in two parts, each of which shall contain the same information, and one of these duplicates is to be posted in the company's office and the other to be forwarded to the Provincial Secretary. Now, in the case in hand, the names of the persons shareholders are not identical in the two summaries. The name of Towner as holding \$1,000 of stock appears in the one transmitted to the Government and it is deleted in the one posted in the head office. I cannot but regard that variance as a default in complying with the provisions of the section, no matter which is right in point of fact, and no matter how the error was committed. It is explained by the manager as arising through inadvertence in not having the correction made in the duplicate sent to the Provincial Secretary, and this explanation may be received for the purpose of moderating

the penalty according to the discretion exercisable by the Court under the Judicature Act, sec. 57 (3) R. S. O. ch. 51, and R. S. O. ch. 108, sec. 1.

Judgment.
Boyd, C.

There was also one day's default in not having a properly verified summary posted up in the office of the company before February 2nd, for the affidavit was not sworn till the 3rd.

I find that the statute was sufficiently complied with by posting up in a conspicuous position in the head office.

On the other branch of the case I find, as I expressed at the close of the argument, that there was no penalty incurred under section 23 of the Act. The name of the company with "limited" added was kept affixed to the outer door and displayed in the window of the head office, so that it was readily seen by the public or those interested.

Permission has been given by the Attorney-General to sue for breaches of both sections in this case to the plaintiff, limiting his right to recover to \$400 in respect of both sections, or if only one cause of action was litigated, restricting the recovery to \$250. That indicates the intention of the Crown to limit the right of recovery to \$200 in respect of each section. I do not know under what state of facts or representations the permission to litigate was given, but the pleadings shew that the plaintiff claims damages on account of the losses alleged to be sustained by him as a shareholder. But no such personal element can be introduced in an action for penalties, particularly as this claim for damages is being discussed between the same parties in County Court. Having regard to the breaches proved, *i.e.*, one day late in posting the summary and the [discrepancy between the office and the official duplicates, and the explanation given for such discrepancy, I think that the proper amount to exact by way of penalty is \$80 and costs of action as to that branch of the case.

The action as to the other branch is dismissed with costs which may be set-off.

A. H. F. L.

NEWELL V. MAGEE.

Landlord and Tenant—Lease for Term of Years—Provision for Sale of Land—Illegal Entry by Purchaser—Trespass—Incoming Tenant.

In a lease of a farm for five years, containing a covenant by the lessor for quiet enjoyment, the lessee agreed that if the place were sold, and he should receive one month's notice prior to the expiration of any year, he would give up peaceable possession and allow any incoming tenant to plough the land after harvest. Before the expiration of the lease the place was sold and conveyed to a purchaser and an assignment of the lease made to him. In the fall of the year, after the purchase, and before the lessee had harvested his crop, the purchaser entered on the land and ploughed it up thereby causing injury to the lessee:—

Held, that the purchaser was a "tenant" within the meaning of the covenant as to an incoming tenant, but that he had no right to enter on the property before the plaintiff had harvested his crop, and was a trespasser and liable for damages caused thereby.

Held, also, that no liability was imposed on the lessor under the covenant for quiet enjoyment.

Statement.

THIS was an action tried before ROSE, J., without a jury, at the Milton Spring Assizes, on the 20th March, 1899.

The action was brought against the defendant Magee for damages for breach of the covenant for quiet enjoyment in a lease; and for damages for trespass as against the other defendant, Raynor.

On the 23rd April, 1895, the defendant Magee (describing himself as administrator of the estate of James Magee) executed an indenture of lease under seal to the plaintiff of fifty acres of land in the township of Trafalgar.

The *habendum* in the lease was "for the term of five years provided we do not sell."

The lease did not purport to be made under the Act respecting short forms of leases. It contained a covenant on the part of the lessor Magee that the lessee should have peaceable and quiet possession of the said lands "without any molestation, hindrance or disturbance of from or by the said lessor, his heirs or assigns, or any other person claiming under him or them," and this further covenant: "The said lessor covenants with the said lessee for quiet enjoyment"; and the following clause: "The said lessee agrees with the said lessor that he will, on receiving one

month's notice, prior to the expiration of any of the years, of sale in any of the years, give up peaceable possession." Statement.

The plaintiff entered into possession under the lease.

About the month of May, 1898, the heirs of James Magee (of whom the defendant Magee was one) sold the lands to the defendant Raynor. The defendant Magee gave notice to the plaintiff that he had sold the property to Raynor and had transferred the lease to him, and that Raynor was to receive the rent, having the privilege of ploughing after harvest and putting in wheat, and that the plaintiff was to have possession till the 1st of April, 1899.

The defendant Raynor claimed the right to enter and plough the land after harvest under a covenant in the lease that the lessee would "allow any incoming tenant to plough the land after harvest in the last year of the term," and thereupon entered upon the premises and, in spite of the protests of the plaintiff, ploughed down a quantity of clover and corn and millet.

The plaintiff claimed damages as against the defendant Magee for breach of his covenant for quiet enjoyment, on the ground that Raynor was his "assign" within the meaning of the covenant, and as against the defendant Raynor for trespass and ploughing down crops.

It appeared that when the deed from the heirs to Raynor was delivered, Magee also executed and delivered an assignment of the lease to the defendant Raynor.

S. F. Washington, for the plaintiff.

A. Elliott, for the defendant Magee.

J. W. Elliott, for the defendant Raynor.

The learned Judge reserved his decision and subsequently delivered the following judgment.

March 25, 1899. ROSE, J.:—

Having regard to the terms of the lease from which it appears that the parties to it contemplated a sale of the farm, I feel no doubt that the purchaser was a tenant

Judgment.

Rose, J.

within the meaning of the covenant by the lessor, to "allow any incoming tenant to plough the said land after harvest in the last year of the said term," etc. It would be unfair to yield to the argument for the plaintiff that "tenant" should be confined to a lessee. The purchaser was a tenant in fee. This is the only place in the lease where the word is used; elsewhere the parties are described as "lessor and lessee."

Then, assuming that the purchaser Raynor committed a trespass, it was, of course, an unlawful act and Magee, the lessor and assignor of the reversion and of the lease, was not liable upon either of the covenants for quiet enjoyment. The lease was not drawn under the Act respecting short forms of leases. *Wotton v. Hele* (1681), 2 Wm. Saund. 524; Foa's Law of Landlord & Tenant, 2nd ed., p. 225; Redman & Lyon's Law of Landlord & Tenant, 4th ed., p. 161, and cases there cited; *Gold Medal Furniture Manufacturing Co. v. Lumbers* (1898), 29 O. R. 75; and in appeal (1899), 26 A. R. 78.

The action must, therefore, be dismissed as against the defendant Magee with costs.

I think, however, that the defendant Raynor was a trespasser in going on the farm before the clover crop had been harvested.

It was for the plaintiff to determine when he would harvest the crop, and the defendant Raynor was not careful to consult the plaintiff's convenience or his wishes.

The plaintiff had, as I read the lease, the whole of the year in which the sale was made, and was entitled to one month's notice of the sale prior to the expiration of such year, and, except under the covenant as relating to an incoming tenant, the defendant Raynor had no right to go upon the farm. By virtue of the sale and notice, such year would become the "last year of the said term."

[The learned Judge then assessed the damages.]

G. F. H.

RE WILSON,

REID ET AL. V. JAMIESON.

Will—Power of Appointment—Disposition by Will—Execution of Power—Invalidity of the Bequest.

A wife having a power of appointment under her husband's will in the words "my said wife shall have full power to dispose of by will or otherwise," by her will devised all her real and personal estate to executors "in trust to convert the same into cash" and pay legacies, and as to the rest and residue to convert into cash and "divide the proceeds among friends, relatives and labourers in the Lord's work according to the judgment of my executors"—

Held, that the disposition made clearly indicated an intention to take the property dealt with out of the instrument containing the power for all purposes, and not only for the limited purpose of giving effect to the particular disposition expressed; but that the residuary bequest was void as too indefinite, and that the executors took the property in trust for the next of kin of the appointor and not beneficially.

THIS was an action for the construction of a will Statement. by the executors of one Mary Wilson, and for a direction from the Court as to the disposal of the residue of her estate in their hands.

One John Wilson, deceased, the husband of Mary Wilson, by his will, after a devise of a lot of land to a daughter, provided as follows:—

"I devise and bequeath all the rest and residue of my property, real and personal, to my wife Mary during the term of her natural life.

"At the death of my wife I devise to her nephew, William Morris, the sum of five hundred dollars should he be then alive, and all the rest and residue of my real and personal property, held and occupied by my wife during her lifetime, I devise and bequeath to my said daughter Elizabeth Reid." And continued: "Should my daughter Elizabeth die before my wife I will and direct that my said wife, Mary, shall have full power to dispose of, by will or otherwise, all the real and personal estate held and occupied by her as aforesaid save and except the legacy bequeathed to her nephew as aforesaid, and should he die

Statement. before my wife she shall also have power to dispose of his legacy as she may think proper."

The nephew, William Morris, survived his aunt, Mary Wilson, and was paid his legacy: the daughter, Elizabeth Reid, died during her aunt's lifetime.

Mary Wilson, who died on 31st May, 1894, by her will gave all the estate, real and personal, of which she died possessed, to her executors "in trust to convert the same into cash, as soon as they can conveniently do so after my decease, and pay the following legacies to the following legatees." The testatrix then named the specific legatees, and then provided as follows: "All the rest and residue of my property, real and personal, I direct my executors to convert into cash, as soon as they can do so conveniently in terms of this my will, and divide the proceeds among friends, relatives and labourers in the Lord's work, according to the judgment of my executors."

A motion for judgment was argued in Chambers on April 14th, 1899, before ROSE, J.

A. Fasken, for the plaintiffs, the executors, cited *Williams v. Kershaw* (1835), 5 Cl. & F. 111; *Coxen v. Rowland*, [1894] 1 Ch. 406.

H. E. Rose, for the next of kin of John Wilson, contended that Mary Wilson had not exercised the power conferred on her by her husband's will, and that the residue of the estate reverted to his next of kin, and referred to *Farwell on Powers*, 2nd ed. pp. 253 and 254; *Brickenden v. Williams* (1869), L. R. 7 Eq. 310, at p. 314; *Bristow v. Skirrow* (1870), L. R. 10 Eq. 1; *Chamberlain v. Hutchinson* (1856), 22 Beav. 444; *In re Davies' Trusts* (1871), L. R. 13 Eq. 163; *In re Boyd*, *Kelly v. Boyd*, [1897], 2 Ch. 232; *Tyssen's Charitable Bequests*, pp. 194, 195.

A. J. Boyd and *Goldwin L. Smith*, for the next of kin of Mary Wilson, contended that by the gift of all her pro-

perty to her executors, Mary Wilson had indicated an intention to dispose of it as her own, and that the residuary clause of her will was void for uncertainty, citing *Vezev v. Jamson* (1822), 1 S. & St. 69, in Jarman on Wills, 5th ed., p. 173; *Higginson v. Kerr* (1898), 30 O. R. 62; *In re Macduff*, *Macduff v. Macduff*, [1896] 2 Ch. 451; *Kendall v. Granger* (1842), 5 Beav. 300; *Williams v. Kershaw* (1835), 5 Cl. & F. 111, 5 L. J. N. S. Chy. 84; *In re Sutton*, *Stone v. Attorney-General* (1885), 28 Ch. D. 464; Jarman on Wills, 4th ed. 214; *James v. Allen* (1817), 3 Mer. 17; Theobald on Wills, 3rd ed. 275; *Nash v. Morley* (1842), 5 Beav. 177; *Bristow v. Skirrow* (1870), L. R. 10 Eq. 1.

W. Davidson, for the objects of the residuary bequests in Mary Wilson's will, referred to *Gillies v. McConochie* (1882), 3 O. R. 203; *Phelps v. Lord* (1894), 25 O. R. 259; *In re Darling*, *Farquhar v. Darling*, [1896] 1 Ch. 50; *In re Jarman's Estate*, *Leavers v. Clayton* (1878), 8 Ch. D. 584; Jarman on Wills, 5th ed. 175; *Fisk v. Attorney-General* (1867), L. R. 4 Eq. 521; *Re Rigley's Trusts* (1866), 36 L. J. Ch. 147.

April 17th, 1899. ROSE, J. :—

[After referring to the terms of both wills] I think it is clear, having regard to the cases cited in Farwell on Powers, 2nd ed., pp. 243, 244, and also to the case of *In re Boyd*, *Kelly v. Boyd*, [1897] 2 Ch. 232, that the disposition made by Mary Wilson clearly indicated an intention to take the property dealt with out of the instrument containing the power for all purposes, and not only for the limited purpose of giving effect to the particular disposition expressed.

The case of *Bristow v. Skirrow* (1870), L. R. 10 Eq. 1, is, I think, in point.

I also think it clear that the executors took this property in trust, and if the residuary bequest is void, then for the next of kin of the appointor, and not beneficially. *Bristow v. Skirrow*, *supra*, is directly in point. In addition,

Judgment. see *Vezev v. Jamson* (1822), 1 S. & St. 69, cited in the
Rose, J. 5th ed. of Jarman on Wills, at p. 173.

I have also come to the conclusion that the residuary bequest is void. I assume in favour of Mr. Davidson's clients that "labourers in the Lord's work" might by extrinsic evidence be shewn to mean the religious sect called Plymouth Brethren, but that does not remove the difficulty. The division is to be in one of two ways: either among friends, relatives and labourers in the Lord's work, so that no one could take unless he was at once a friend, a relative and a labourer, or amongst friends, relatives and labourers as three distinct classes.

In the first event, the word "friends" makes the whole class indefinite to such a degree as to put the gift wholly beyond the control of the Court, and so in my opinion the bequest is void.

In the other event, it would rest in the discretion of the executors to give it to the friends or relatives or labourers, and again the friends would be such an indefinite object as to place the administration of the trust beyond the control of the Court.

The rules governing the case are laid down on pp. 174, 175 of Jarman on Wills, 5th ed. See also *Higginson v. Kerr* (1898), 30 O. R. 62.

The result is, in my opinion, that the executors hold in trust for the next of kin of Mary Wilson. The costs of all parties will be paid out of the estate.

G. A. B.

[DIVISIONAL COURT.]

CANADA PERMANENT LOAN AND SAVINGS COMPANY V.
BALL ET AL.*Principal and Surety—Mortgage—Variation of Contract—Giving Time—
Novation—Discharge of Surety.*

A mortgage of leasehold lands to secure \$5,000 made by three trustees and executors under a will recited their appointment, and that the moneys were required for the purpose of the estate, the mortgage being under the Short Form Act, and containing the usual covenant for payment by mortgagors. In 1888, under the provision therefor in the will, a new executor and trustee was appointed, the retiring one of the original three being released, and all his interest vested in his successor and those remaining. In 1892, while \$3,000 still remained due, the security being greatly diminished in value, and worth no more than the amount then due on it, the plaintiffs, with a full knowledge of all the facts, entered into an agreement under seal with the then executors and trustees for an extension of the time for payment of the principal, which though providing for a reduction of the rate of interest, also provided for its being compounded, and that the rate was to apply as well before as after maturity. The agreement contained a covenant by the then executors and trustees to pay the mortgage money, and also a proviso that the extension was consented to in as far as the company might do so without infringing on or in any way affecting the interests of other parties in the mortgaged premises, all rights and remedies against any security or securities the company might have against any third person or persons upon the original security being reserved :—

Held, that the agreement to extend the mortgage was in effect a transaction for a new loan on different and more onerous terms, and that as between the executors and trustees, as last constituted, and the one who had retired the relationship of principal and surety was created, and, by virtue of the agreement, notwithstanding the reservation of remedies the surety was discharged.

THIS was an action tried before ROSE, J., without a jury, Statement.
at Toronto, on November 7th, 1898.

The action was on a covenant contained in a mortgage made by the defendants, Jane Ball, James Thompson, and Charles Sellers, to the plaintiffs.

The facts fully appear in the judgments.

S. H. Blake, Q.C., and *Beaumont*, for the plaintiffs.

Osler, Q.C., and *James Reeve*, Q.C., for the defendant Thompson.

Masten, for the defendant Jane Ball.

The defendant Charles Sellers did not appear.

Judgment. The learned Judge reserved his decision and subsequently delivered the following judgment.
Rose, J.

November 7th, 1898. ROSE, J. :—

One John Ball died in the year 1886, having by his last will and testament devised his estate to his wife, Jane Ball, and to Charles Sellers and James Thompson, of Toronto, as trustees, upon the trusts therein named, and provided that in the event of any one of the said trustees wishing to be discharged from the trust the other trustees might appoint a trustee in the place of the one so wishing to be discharged.

On the 18th May, 1887, the said trustees mortgaged to the plaintiff company a certain portion of the estate to raise the sum of \$5,000, to enable them to carry out the trusts of the will. By the terms of the mortgage the \$5,000 were payable, \$500 on the 1st days of May, 1888, 1889, 1890 and 1891, and \$3,000 on the 1st of May, 1892, with interest on all unpaid principal at the rate of 7 per cent. per annum half-yearly, on the 1st days of May and November in each and every year until the principal sum should be fully paid and satisfied, "and after as well as before maturity of this mortgage at said rate."

The mortgage contained an agreement entitling the mortgagors, on any 1st day of May during the said term, after having paid three years' interest thereon, to repay all or any part of the said principal sum without giving any notice thereof, upon payment of the accrued interest at the date of such payment and three months' interest in advance.

In or about the month of March, 1888, the trustee Thompson desiring to be released from his office, it was agreed that Robert Wilson should be appointed trustee in his place. I assume for the purpose of my opinion, without, however, so deciding, that the document of release and appointment was sufficiently proved. I take for that purpose exhibit 12 as evidencing the new appointment.

There is nothing in such agreement or appointment binding the new trustee to pay the mortgage in question or to relieve Thompson from his liability on his covenant.

Judgment.

Rose, J.

At the trial I ruled, and still think that I did so correctly, that, notwithstanding the argument to the contrary, the liability entered into by the trustees was a personal liability. The cases of *Furnivall v. Coombes* (1843), 5 M. & G. 736; *Beaty v. Gregory* (1897), 24 A. R. 325; *Berkeley Street Church v. Stevens* (1875), 37 U. C. R. 9, may be referred to.

The rights of the parties, therefore, at the time of the appointment of Wilson as trustee in place of Thompson, as I understand them, were these: Thompson, with his former co-trustees, was liable to the plaintiff company to pay the mortgage debt; the land in question could be resorted to for the payment of such debt, or to recoup the trustees if they were compelled to pay; and the trustees might also apply any other assets in their hands in and towards its payment, or recouping themselves. But if the assets were not sufficient to pay this debt or to recoup the trustees, they having paid the debt, then, subject to any right that they might have as against the *cestui que trust*, they must bear the loss.

When Wilson was appointed in place of Thompson, he did not undertake any personal liability towards either the plaintiff or Thompson. He did not agree with the plaintiff to pay the debt, nor did he agree with Thompson to pay the debt or to indemnify him against its payment, and, as far as I know, the only liability that he incurred was to see that the assets which came into his hands or control as trustee were properly applied in payment of it; but, if there was any loss, Thompson with his former co-trustees, must bear it, and he (Wilson) was not liable in respect of such loss at all, assuming that as trustee he had done his duty.

It is difficult to see, therefore, how the doctrine of principal and surety arises, as discussed in *Land Security Co. v. Wilson* (1895), 22 A. R. 151; 26 S. C. R. 149; *Trust and*

Judgment. *Loan Co. v. McKenzie* (1896), 23 A. R. 167; and *Bristol and West of England Land, etc., Co. v. Taylor* (1893), 24 O. R. 286.
Rose, J.

At the trial it was argued on behalf of the defendants that there had been novation. I do not think so. There seem to me to be entirely lacking the ingredients referred to in *Wilson v. Lloyd* (1873), L. R. 16 Eq. 60, at p. 74. See also *Land Security Co. v. Wilson* (1895), 22 A. R. 151, at p. 157; and *S. C.*, 26 S. C. R. 149, at p. 154.

Applications were made for a loan—that is, the form of applications for a loan was gone through, to which I do not think it of value to more fully refer, because I think that I must take the agreement of August, 1892, as being the next step which at all affects the rights of the parties. In that month the new trustees obtained from the plaintiff company an extension of time for the payment of \$3,000, being the \$3,000 which, according to the terms of the mortgage above set out, became due on the 1st May, 1892. There was, therefore, default in the payment of the mortgage and the whole of the money was due. The new trustees obtained an extension of time, and by the document evidencing such extension the proviso for payment in the agreement was substituted for that in the mortgage, and read as follows: “Provided the said mortgage to be void on payment of \$3,000, as follows: \$500 on the 1st day of May, 1893, and the balance of principal on the 1st day of May, 1894, together with interest on all unpaid principal at the rate of $6\frac{1}{2}$ per cent. per annum, payable half-yearly on the 1st day of May and November in each and every year, until the said principal sum shall be fully paid and satisfied, the first of said instalments of interest to become payable on the 1st day of November, 1892, and such interest to be computed from the 1st day of May, 1892, and said rate of interest to be paid after as well as before the maturity of this agreement.”

It will be observed that this proviso was more favourable to the trustees than the proviso in the mortgage, the inter-

est being reduced to $6\frac{1}{2}$ per cent. By the agreement the trustees waived their privilege for prepayment contained in the mortgage, but as the mortgage was overdue at the time of the agreement, such privilege had expired.

Judgment.

Rose, J.

By the agreement the trustees covenanted with the company to pay the principal sum and interest on the days and times above stated, and in default of payment of any instalment of interest, that the same should become principal and bear interest at the rate aforesaid. It is said that this clause imposed, or might impose, a greater burden upon the trustees. If no interest was paid for a sufficient length of time to increase the principal by a sum, the interest on which would overbalance the reduction to $6\frac{1}{2}$ per cent., no doubt, under the terms of the new agreement more money would be called for than under the prior mortgage, otherwise this clause would not be burdensome.

The agreement contained the following clause: "The company consent to such extension on the terms and conditions above stated, in so far as they may do so without infringing on or in any way affecting the interests of other parties in the said mortgage premises; and the company reserve to themselves all their rights and remedies against any surety or security they may have for payment of said debt, or right they may have against any third person or persons upon their original security."

If by what the parties have done as between themselves, Thompson had ceased to be and Wilson had become a principal debtor, and the new trustee was bound as between himself and Thompson to pay off the mortgage debt and save Thompson harmless in respect thereof, so that as between themselves thereafter Wilson was a principal debtor and Thompson was merely a surety, then it is urged that on the principle laid down in *Bristol and West of England Land, etc., Co. v. Taylor* (1893), 24 O. R. 286, Thompson has been discharged because what has been here done by the company has been to his prejudice or might prejudice him. By reason of the difference of the facts in this case from those in *Bristol and West*

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Rose, J.

of England Land, etc., Co. v. Taylor, I am unable to apply the doctrine there laid down. I do not see how Thompson has at any time been prejudiced or could be prejudiced, or how his rights as between himself and the company, or as between himself and Wilson and the other trustees, have been at all affected. The company expressly reserved to itself the right to call upon him (Thompson) to pay the debt, and that reservation, to be of any value at all, must have been such as to entitle the company to call upon Thompson and his co-trustees at any time to pay the debt and to enable the company at any time to foreclose and sell the property, and this notwithstanding the agreement of extension. Thompson was always in a position to pay off the debt and to have the assets of the estate applied in repayment, and the fact that the company gave the new trustees further time did not, as far as I can understand it, in any respect affect the rights of Thompson or his security for the payment of the debt for which he had become liable.

I am, therefore, of the opinion that the defence fails, and that judgment must be entered up for the plaintiff company for the amount claimed with interest and costs.

From this judgment the defendant Thompson appealed to the Divisional Court.

On March 13th, 1899, before a Divisional Court composed of BOYD, C., and ROBERTSON, J., the appeal was argued.

James Reeve, Q.C., supported the appeal. Under the mortgage it was not intended to enforce any personal liability on the executors. The plaintiffs knew that the loan was to the estate, and that the then mortgagors were merely executors. The recitals in the mortgage, and in the application, and the solicitor's report, shew this: *Land Security Co. v. Wilson* (1895), 22 A. R. 151. The defendant Thompson tendered evidence to shew that the arrangement was that

only the liability of the estate was to be pledged and not the personal responsibility of the executors, and this evidence should not have been rejected. The covenant must be read in the light of the whole transaction. The defendant Thompson's liability under the mortgage could at the most be only a liability as surety to the estate, and his liability would be only a joint liability, but, even if a principal, he became a surety by the transaction of 1888, when he ceased to be an executor, and the plaintiffs with knowledge of the fact, and that he had been released from all liability to the estate, entered into the agreement in 1892 whereby the time for payment is extended and different terms entered into, namely, the terms for the payment of the principal and as to the rate and payment of the interest. It is immaterial whether the new contract was more beneficial or not, but as a matter of fact it imposed a more onerous liability. The defendant was therefore discharged. There was also a novation by the agreement of 1892. The covenant in the mortgage and the covenant under the agreement are quite inconsistent with one another, and therefore cannot stand together: *Bristol and West of England Land, etc., Co. v. Taylor* (1893), 24 O. R. 286; *Trust and Loan Co. v. McKenzie* (1896), 23 A. R. 167; *Kendall v. Hamilton* (1879), 4 App. Cas. 515; *Wegg-Prosser v. Evans*, [1894] 2 Q. B. 101. If necessary the contract should be reformed so as to carry out the true intention of the parties. There is ample evidence to justify the reformation.

S. H. Blake, Q.C., and Beaumont, contra. As to the rejection of evidence. The point taken by the plaintiffs at the trial and now urged by them is that the evidence could not be received. The evidence that the defendant Thompson attempted to give was what that defendant's view of the transaction was, and this clearly could not bind the plaintiffs. The mortgage and the covenants in it must speak for themselves. The application in no way bears out the defendant's contention that there was to be no personal liability. It is for a loan of so much money

Argument.

Argument. on the usual form of application, and it is reported on by the solicitors in the usual way, and the mortgage is drawn up and submitted to the defendants and they approve of it. In the face of all this it cannot be said that there was to be any limited liability. No company would take a mortgage without having the personal liability of the mortgagors; the very fact of any attempt to limit the liability would create suspicion. The fact is that the defendants thought at the time that the land was ample security and they never would be called on personally. There is therefore no ground for reformation. The agreement of 1892 in no way constitutes an extension of time within the meaning of the rule as regards principal and surety. There was no intention to release any of the parties, and in fact all the rights against them are expressly reserved. The terms of the agreement are in no way detrimental but beneficial, to the defendant, as the interest is reduced from 7 per cent. to $6\frac{1}{2}$ per cent. There was no novation. Both the original mortgage and the agreement of 1892 can be read together: *Trust and Loan Co. v. McKenzie* (1896), 23 A. R. 167; *McGeachie v. North American Life Ass. Co.* (1892), 23 S. C. R. 149; *Bristol and West of England Land, etc., Co. v. Taylor* (1893), 24 O. R. 286; *Furnivall v. Coombes* (1843), 5 M. & G. 736; *Beaty v. Gregory* (1896), 28 O. R. 60; in appeal (1897), 24 A. R. 325; *Bolton v. Buckenham*, [1891] 1 Q. B. 278.

April 8th, 1899. BOYD, C.:—

The plaintiffs made a loan to the three executors of John Ball on the security of leasehold property of the estate taking a joint covenant of the three executors to pay the money advanced, \$5,000. The leasehold was the principal security to the company, the covenant being incidental. Ball died in February, 1886; probate issued in March, 1886; and this mortgage was in May, 1887, and the money was thereby raised in order to carry out the trusts

of the will—to pay claims against the estate—as appear by the evidence and the recitals. It is also in evidence that the defendant Thompson took no active part in the executorship, merely helped as a neighbour, handled none of the money, and received nothing from the estate.

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Boyd, C.

The next set of facts is that about 15th March, 1888, documents were executed which released Thompson from the executorship, and another, one Wilson, appointed in his stead. This was pursuant to the provisions of Ball's will, and the effect of it was that all the estate passed out of Thompson and became forthwith vested in Wilson as the new co-executor. The recital shews that the estate had not been fully got in and realized or the several trusts carried out. This passed the equity of redemption in the leasehold premises away from Thompson into the new body of executors—two of whom were the original executors. The legal effect of that transfer was to give Thompson the right of indemnification against the then executors, who took all the assets, in case he was called on to pay the mortgage. That would be the proper implication from all the circumstances, if nothing was said either for or against it. That such would be the consequence in the case of a sale of the equity of redemption is well established by authorities from *Waring v. Ward* (1802), *per* Lord Eldon, 7 Ves. 332, to *Williston v. Lawson* (1891), 17 S.C.R. 673, 578 (*per* Strong, J.). See, also, *Beatty v. Fitzsimmons* (1893), 23 O. R. 245, 249, where the principles are well stated. And it seems eminently just that the like result should follow though the transfer was voluntary if the means wherewith to pay the debt accompanied the gift. Upon this point the language of Porter, M. R., in *Adair v. Carden* (1892), L. R. 29 Ir. Ch. 469, at p. 482, is apt: "Suppose * * , instead of a sale, a gift. If a man, by voluntary deed, conveyed to another a property encumbered with a mortgage debt, presented him the estate just as it stood, it could hardly be supposed that the grantor should remain liable to pay the incumbrances in exoneration of the land."

The evidence here is that the property mortgaged was

Judgment. deemed of ample value to answer the amount secured by
Boyd, C. it down to a remote later date.

I take it then that as between themselves, the executors, as last constituted, became the principal debtors, and Thompson security for them on the covenant. This condition of affairs became known to the company before the occurrence of the next set of facts. Payments on the mortgage were duly met by which the principal was reduced to \$3,000. That sum was to be paid on 1st May, 1892, but instead of that being done, there was a new arrangement between the company and the executors (running from May to August, 1892), which resulted in an agreement, under seal, to postpone the time of payment for two years. Besides extending the time, various other changes were made wherein the new bargain differed from the original mortgage. Thus certain privileges of prepayment given in the mortgage were cancelled in 1892, and the original rate of interest at 7 per cent. was reduced on the one hand to $6\frac{1}{2}$ per cent., but on the other there was a new provision for compounding the interest on default, coupled with a stipulation that the said rate of interest was to be paid after as well as before the maturity of the agreement. The then executors therein also covenanted to pay the principal and interest as stipulated.

The instrument is drawn up so as to provide that a new redemption clause shall be substituted for that contained in the mortgage, whereby the then owners of the property thereby affixed a lien thereon in many respects different from that contained in the mortgage, and now more burdensome.

The instrument recites that the three executors were the parties who made the original mortgage, and though this is technically erroneous yet it may substantially represent what is no doubt the fact that the company always considered the leasehold as the main and sufficient security and did not regard the covenants of the individuals.

This state of facts, if nothing more remained, would justify the conclusion that this new agreement was such a

dealing with the security and the principal debtors as would, without Thompson's assent, discharge him as surety. Because all was done without any reference to him, the company knowing or being affected with knowledge of the fact, that he had withdrawn lawfully from the executorship, and his place filled by another, in whom all the estate vested.

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Boyd, C.

It is now requisite to examine the provision in the agreement which it is argued has the effect of warding off this result. It is in these words: "The company consent to such extension * * in so far as they may do so without infringing on or in any way affecting the interests of other parties in the said mortgaged premises. And the company reserves to themselves all their rights and remedies against any security or securities they may have for payment of said debt or right they may have against any third person or persons upon their original security."

Thompson does not fall within the first clause, for he had ceased to have any interest in the mortgaged premises; but assume that he as surety is within the second clause (which is, however, perhaps not its proper strict construction) then there is a reserve of rights as against him as surety. According to the cases this might avail if there was nothing more than an extension of time for payment, but it does not help when the contract is otherwise varied to his prejudice. It is material to remember that this was a wasting security—a terminable leasehold, and, pending the further time allowed by the company, behind the back of Thompson, its value deteriorated so much that on the 1st May, 1894, the appraiser of the company reports: "This lease having only four years to run and not having any arrangement as to what rate at which lease will be renewed I would not place any value on same."

Then there is the provision for compounding the interest at $6\frac{1}{2}$ per cent. half-yearly, calculated to be carried on after the maturity of the agreement and till payment,

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Boyd, C.

which imposes a heavier lien on the property than was created by the mortgage. The withdrawal of the right to prepay may also have operated to the detriment of the surety; so that altogether I think the changes are quite within the scope of Lord Cottenham's opinion, which was adopted by Lord Brougham in *Bonar v. Macdonald* (1850), 3 H. L. C. 226, at p. 238. He says there "The rule extracted from the English authorities * * is, that any variance in the agreement to which the surety has subscribed, which is made without the surety's knowledge or consent, which may prejudice him, or which may amount to a substitution of a new agreement for a former agreement, even though the original agreement may, notwithstanding such variance, be substantially performed, will discharge the surety."

Upon this point also it is our duty to follow the decision of the Divisional Court in *Bristol and West of England Land, etc., Co. v. Taylor* (1893), 24 O. R. 286, which was treated as law in *Trust and Loan Co. v. McKenzie* (1896), 23 A. R. 167.

There is again another aspect of the case, apart from suretyship, upon which the authorities converge to the same issue favourably to the defendant. That is to say, this agreement to extend the mortgage was in its real effect a transaction for a new loan at a different rate of interest and on new terms of redemption. In substance the old loan was paid off and a new one substituted: see *per* Lord Lyndhurst in *Oakeley v. Pasheller* (1836), 10 Bligh N. R. 548, at p. 584; and *per* Bacon, V.-C., in *Wilson v. Lloyd* (1873), L. R. 16 Eq. 60, at p. 73. There was thus by the change of terms a substitution of the last body of executors for the original mortgagors; the terms of the last agreement are inconsistent with those of the first; the two cannot stand together; and that which was last enacted prevails over that for which it was substituted. See judgment of Lord Esher in *Bolton v. Buckenham*, [1891] 1 Q. B. 278, 281; and at law see such cases as *Thompson v. Percival* (1834), 5 B. & Ad. 925; and *Hart v. Alex-*

ander (1837), 7 C. & P. 746, affirmed in *S. C.* (1837), 2 Judgment.
M. & W. 484, and approved by Blackburn, J., in *Maxted* Boyd, C.
v. *Paine* (1871), L. R. 6 Ex. 132, at p. 157.

The questions are novel and difficult and Judges may well come to different conclusions, but for myself I am unable to agree with the judgment under appeal, and think it should be reversed. In other words the action should be dismissed with costs.

ROBERTSON, J. :—

The facts are as follows: The defendants, Mary Jane Ball, Charles Sellers and James Thompson, who were executors of one John Ball, who died in 1886, made a mortgage of leasehold property in the city of Toronto, held by the testator by indenture of lease bearing date 30th December, 1876, from the trustees of the Toronto General Hospital, for the term of twenty-one years from 1st January, 1877, subject to the rents and covenants, etc., therein reserved and contained, to secure the repayment of \$5,000. The money was borrowed for the purposes of the estate.

The mortgagors are described therein as trustees and executors under the said will; and it is recited that Ball by his said will, which is dated 30th January, 1884, devised all his real and personal estate to the mortgagors, appointing them his trustees and executors upon certain trusts in the will set forth; and, further, that it being necessary to carry out the trusts of the will the sum of \$5,000 should be raised on mortgage of the leasehold lands therein described, and that the mortgagors had negotiated a loan with the company (the plaintiffs) for the advance of said sum, and had agreed to assign to them the said term by way of mortgage to secure said advance; then it is witnessed that, in consideration of the premises and of the said sum of \$5,000, etc., the mortgagors granted and mortgaged to the company (in exercise of the powers vested in them as such trustees and executors, etc.), all and singular, etc. The mortgage bore interest at 7 per cent. per annum payable

Judgment. half-yearly, and bore date on 18th May, 1887. The mortgage is in short form and contains a covenant for payment of the mortgage money, which was made payable by instalments, \$500 on 1st May, 1888, and three following years, and \$3,000 on 1st May, 1892. The value of the lease was stated in the application for the loan to be \$10,000. The valuator of the company reported as follows: "The buildings I value at \$4,000, and insurance to that amount can be obtained. The lease I consider worth \$4,000. The present rents are payable under leases and will, I believe, be maintained, if not increased. They are capable of providing for interest and a yearly payment of \$500, on account of principal. Land in neighbourhood no better, if as eligibly situated, has sold for over \$400 a foot, including old frame buildings." This was on 17th May, 1887.

By the will of Ball, it is provided that in the event of any one or more of the trustees, dying or wishing to be discharged, the surviving trustees, may appoint a trustee and executor in the place of the one so dying or wishing to be discharged, and upon such appointment the whole of the said estate shall become vested in the new trustee or trustees jointly with the surviving trustee or trustees, and so on from time to time whenever any trustee, die, or wish to be discharged, etc.

About 15th March, 1888, the trustee Thompson, being desirous of being relieved from the trusteeship, was so relieved by a deed under seal, and one Robert Wilson was appointed in his stead, and Thompson was released from the trust and from that time ceased to be a trustee.

On the 1st May, 1892, the instalment of \$3,000 became due and the then trustees, Mrs. Ball, Sellers and Wilson, made an application which resulted in an agreement between them and the company to extend the time for payment of the \$3,000 in instalments as follows: \$500 on 1st May, 1893, and balance on 1st May, 1894, with interest at $6\frac{1}{2}$ per cent. per annum, payable half-yearly. In that agreement a new redemption clause, it is agreed, shall

be substituted for that contained in the original mortgage, Judgment.
which shall be construed and read as follows: Provided Robertson, J.
the said mortgage to be void on payment of \$3,000 as follows—\$500 on 1st May, 1893, and the balance of principal on 1st May, 1894, together with interest on all unpaid principal at the rate of $6\frac{1}{2}$ per cent. per annum, payable half-yearly on 1st May and November, etc. Then follows a covenant by the applicants (Ball, Sellers and Wilson), to insure, etc. "In all other respects the said mortgage shall continue in force as written. The said parties of the second part covenant with the company that they will pay the principal sum and interest," etc. Then there is the following: "The company consent to such extension on the terms and conditions above stated, in so far as they may do so without infringing on or in any way affecting the interests of other parties in the said mortgage premises. And the company reserve to themselves all their rights and remedies against any surety or security they may have for payment of said debt, or right they may have against any third person or persons upon their original security."

Now, it appears to me reasonably clear that the company, at the time of this agreement, treated Mrs. Ball, Sellers and Wilson, as the only parties who were liable on the mortgage of 18th May, 1887. The defendant Thompson had dropped out, and the company's reservation of rights, etc., did not extend against him, because under that mortgage and by it he was a principal debtor and not a surety, nor was he a third person outside of the covenant in the mortgage. In fact, he was a joint covenantor with Mrs. Ball and Sellers, so that when the plaintiffs agreed to the extension of time, they were aware that Thompson had ceased to be a trustee and that Wilson had been appointed in his place; and they not only accepted in substitution the covenant in the agreement for that contained in the mortgage, but they also substituted the proviso for redemption. It is not pretended that Thompson had been consulted in regard to this extension of time,

Judgment. nor had he in any way consented thereto; in fact, there is evidence that he had no knowledge of it whatever until shortly before the action was brought. On the authority of *Farhall v. Farhall* (1871), L. R. 7 Ch. 123, the three executors became joint debtors on their covenant contained in the mortgage, but so soon as Thompson was relieved of his trusteeship, the assets of the estate became vested in the other trustees and the new trustee Wilson, and from that time the most that can be made of it is that Thompson became a surety under his joint covenant. I think *Oakley v. Pasheller*, 4 Cl. & F. 207, is authority for that, so that when the extension of time was given, without the consent of Thompson, he was discharged. He could not pay off the mortgage and call upon his co-covenantors to reimburse him, because they could set up as a defence that the covenantee had extended the time for payment and had otherwise changed the conditions of the mortgage.

In *Rouse v. Bradford Banking Co.*, [1894] A. C. 586, at p. 592, Lord Herschell, L.C., says: "If, notwithstanding that both the debtors appeared to be principal debtors, the knowledge afterwards that one of them is a surety only disentitles you to deal with the other in the way of giving time without discharging that debtor, then it seems to me it must be equally the case (for otherwise there would be a distinction resting on no intelligible or sound basis), that where, although both are principal debtors at the time, one of them afterwards, as between himself and his co-debtor, becomes a surety, that one is discharged if time be given to the other."

I cannot distinguish this case from *Oakeley v. Pasheller* (1836), 10 Bligh N. R. 548. There it was the case of one of the partners of a firm of merchants having died, and by an arrangement which took place between the representatives of the deceased and the new partnership, a new partner having been taken in when the deceased partner died, by which, in consideration of the outstanding debts and effects of the former partnership, would *inter alia* indemnify the estate of the deceased

against certain debts, including the bonds which were the Judgment. subject of the suit. No notice of that agreement was Robertson, J. given to the holder of the bonds. He continued to receive interest on the bonds from the new firm as well before as after. From the correspondence between the holder and the new firm, it appears that he had given them further time to pay—once for three years and afterwards for twelve months. These indulgences were granted without the consent of the executors of the deceased. Afterwards the holder took from the new firm a collateral security for part of the debt, expressly reserving his right against the deceased's estate in respect of the bonds, but concealing that arrangement from his executors. Afterwards the executors of the holder of the bonds applied for payment to the deceased partner's executors, who thereupon filed their bill praying that it might be declared that their testator's estate was discharged from the bonds. This was in 1820, long before the Judicature Act. In giving judgment, Lord Lyndhurst said, at p. 233: "Now the principle of law is that where a creditor gives time to the principal debtor, there being a surety to secure payment of the debt, and does so without consent of or communication with the surety, he discharges the surety from liability, as he thereby places him in a new situation and exposes him to a risk and contingency to which he would not otherwise be liable. That being the fact in this case, I am of opinion that the representatives of Howard (the deceased partner) were discharged from liability." In this opinion Lord Chancellor Cottenham agreed.

Then, as regards one of two or more principal debtors ceasing to be a principal, and becoming a surety, I am of opinion that *Oakeley v. Pasheller* (1836), 10 Bligh N. R. 548, makes it clear, that although at one time, one of several joint debtors, yet by an arrangement between these joint debtors, one of them may become a surety to the original creditor, which was the case here, when Thompson ceased to be a trustee, and the assets of the estate vested in him, became vested in the remain-

Judgment. ing trustees and the new trustee, to all intents and purposes he became a surety, and by implication indemnified by the then trustees, if he was not discharged entirely by the plaintiff company accepting the remaining and new trustee, Wilson, in substitution for the balance of \$3,000 which was due on the mortgage when the further time was given for its payment.

But it is said all rights were reserved. Let us consider that. The defendant Thompson ceased to be a trustee in March, 1888, about ten months after the mortgage had been given. On 25th May, 1892, the amount of the mortgage having been reduced by payment to \$3,000, the then acting trustees applied for a loan of \$3,000 on the same property, presumably for the purpose of paying off the mortgage. The result of this application was that in August, 1892, the company, instead of advancing this sum, extended the time for payment of the mortgage money, without the consent of Thompson. Now, it is clear that, if the plaintiffs did not know of the defendant Thompson having ceased to be a trustee, at the time he was released therefrom, they did know of it, at the date of the agreement for extension, because they treat Wilson as one (and the agreement is silent as to Thompson); and they recite in said agreement that he, Wilson, is, with Mrs. Ball and Sellers, the executors of the late John Ball, deceased; and, moreover, they recite that they were the mortgagors—not that Thompson, Ball and Sellers, but that Ball, Wilson and Sellers had, “by indenture dated 18th May, 1887, mortgaged certain leasehold lands,” etc., being the mortgage in question, shewing that at this time, Wilson was treated as mortgagor instead of Thompson. I do not think, therefore, that plaintiffs can be heard to say now, that they did not know the real state of the parties, so that on the authorities referred to, although Thompson had been one of three joint debtors at the time the extension of time was granted, he was at most a surety. If, therefore, the plaintiffs intended to reserve their rights against him as surety, it was their

duty to notify him of it and get his consent thereto. It Judgment. appears to me that rule is peculiarly applicable to this case, Robertson, J. and should be applied with strictness. The original mortgagors were in fact and in truth, as between themselves and the estate of which they were trustees, sureties only. If they had been obliged to pay the mortgage money out of their own funds they certainly could look to the estate to be recouped. The plaintiffs knew this, because they are expressly described in the mortgage as trustees and executors, under Ball's will. It is also recited that the testator was the lessee of the premises mortgaged, as before stated, for a term of twenty-one years from 1st January, 1877.

Now, by the extension of time, Thompson was placed in a more unfavourable position in regard to the security. In May, 1892, when the mortgage money was due, the mortgaged term had about five years and seven months to run, and in two years after, when the trustees requested and applied in writing for a further extension, viz., in May, 1894, the appraiser of the company to whom the application was referred, reported as follows: "This lease having only four years to run" (in fact, it only had three years and seven months) "and not having any arrangement as to what rate at which lease will be renewed, I would not place any value on same," so that the security was becoming less valuable, day by day; but in the face of the fact of the mortgaged security becoming less valuable day by day, the company extended the time of payment, without consulting Thompson or notifying him of the fact, so that if he had the right to compel the payment of the mortgage money, he was not aware that it was in default; he had ceased to be a trustee years before, and I think it only reasonable to suppose that he had a good right to think that any liability on his part had ceased to exist. If he had known that he was still to be held liable, it is only reasonable to suppose that he would have insisted upon the money being made on the date when the mortgage became due, taking into account the decreasing value

Judgment. of the leasehold and the other conditions in the mortgage, Robertson, J. for his benefit. Thompson was, therefore, exposed to a risk and contingency, which he would not otherwise be liable to ; that was placing him in a new position, and he had a right to be consulted as to that.

In *Holme v. Brunskill* (1877), 3 Q. B. D., 495, at p. 505, Lord Justice Cotton, says : " The true rule in my opinion is, that if there is any agreement between the principals with reference to the contract guaranteed, the surety ought to be consulted, and that if he has not consented to the alteration, although in cases where it is without enquiry evident that the alteration is unsubstantial, or that it cannot be otherwise than beneficial to the surety, the surety may not be discharged ; yet, if it is not self-evident that the alteration is unsubstantial, or one which cannot be prejudicial to the surety, the Court will not, in an action against the surety, go into an enquiry as to the effect of the alteration * * but will hold that in such a case the surety himself must be the sole judge whether or not he will consent to remain liable notwithstanding the alteration, and that if he has not so consented he will be discharged."

I therefore, with all due respect, am of opinion, that so far as defendant Thompson is concerned, the judgment of my learned brother Rose, should be reversed, and the action dismissed with full costs as to Thompson.

G. F. H.

HASTINGS V. SUMMERFELDT.

Penal Actions and Penalties—Provincial Election—Inadvertently Spoiled Ballot Paper—R. S. O. ch. 9, sec. 109—"Conveniently"—Deputy Returning Officer—Shewing Ballot Paper and Refusing to Give New One—Breach of Duty—Damages.

The word "conveniently" in section 109 of R. S. O. ch. 9, The Ontario Election Act, means "conveniently for the voter and for his wish, purpose and intention in voting."

The plaintiff, an elector, in marking his ballot at an election of a member to serve in the Legislative Assembly of Ontario inadvertently marked it for the candidate against whom he intended to vote. He immediately and before he had left the apartment at the polling place set apart for marking ballots informed the defendant, the deputy returning officer, of his mistake, and asked for another ballot paper. The defendant said he must first see the marked ballot paper, which the plaintiff refused to allow, but, on the scrutineer for his party recommending him to do so, he handed it to the defendant, without creasing or folding it that it might be placed in the ballot box, in such a way that those present could not see how it was marked. The defendant looked at it, and then either shewed or placed it so that it could be and was seen by nearly all present, and contending that it was not a spoiled ballot, contrary to the plaintiff's protest, placed it in the ballot box, and it was counted for the person against whom the plaintiff intended to vote:—

Held, that the defendant by his acts in disclosing how the plaintiff marked his ballot paper, in not cancelling it, and in refusing to give the plaintiff another ballot paper on his demanding one, and by his action compelling him to vote for the candidate whom he wished to oppose, was thereby guilty of breaches of duty which entitled the plaintiff to judgment in his favour for the penalties under the statute.

THIS was an action tried before FALCONBRIDGE, J., with-
out a jury, at Toronto, on the 16th, 17th and 18th October,
1898. Statement.

The action was brought against the defendant, a deputy returning officer of polling subdivision No. 6 of Markham, in the electoral riding of East York, at the provincial election held on March 1st, 1897, to recover the sum of \$400 claimed for penalties and damages against the defendant under the Act respecting Elections of Members of the Legislative Assembly of the Province of Ontario, R. S. O. ch. 9, and amendments, with interest thereon, etc.

Ritchie, Q.C., and John Greer, for the plaintiff.

T. M. Higgins, for the defendant.

The facts so far as material are set out in the judgment.

The learned Judge reserved his decision, and subsequently delivered the following judgment.

Judgment. March 20, 1899. FALCONBRIDGE, J.:—

Falconbridge,
J.

The facts of the case, as I find them to be established by the evidence, are as follows:—

The plaintiff and the defendant are both well-to-do and respectable farmers, residing on the same concession in the township of Markham. The plaintiff is and always has been a conservative, and this fact was well-known in the community and by the defendant on and prior to the provincial elections, which were held on 1st March last.

At such election the defendant was duly appointed and acted as deputy returning officer of polling subdivision No. 6 in the township of Markham, in the electoral riding of East York. J. Nye was poll clerk, Allan McKinnon, constable, and Wilfrid McKay, scrutineer for the reform candidate (Mr. Richardson), and Wm. Finley, scrutineer for the conservative (Mr. Moyes).

It is unnecessary to say that the defendant, Nye, McKinnon and McKay, were well-known and pronounced reformers.

Late in the afternoon, between four and five, the plaintiff came into the booth and asked for a ballot. The defendant handed him one, without objection, and without any request that the plaintiff should be sworn, indicating by moving a pencil which he had in his hand that the plaintiff should mark his ballot on the right hand side. The plaintiff claims that these instructions caused him to mark his ballot wrongly, as he says he afterwards did; but it is not contended, and it is not the fact, that the defendant used any endeavour to mislead the plaintiff in his marking.

The plaintiff went into the compartment and marked the paper inadvertently for Richardson, whereas he intended to vote for Moyes. Before coming out he told the defendant he had spoiled his ballot and wanted another, and then he came out. Finley said the plaintiff ought to have another. The defendant refused to give him another until he had seen the one which the plaintiff said was spoiled, saying he could not tell whether it was spoiled or

not till he had seen it. The plaintiff hesitated about giving it up until Finley recommended him to do so, both Finley and plaintiff expecting that the latter would get another one. Then the plaintiff presented it to the defendant, holding it in such a way as not to disclose how it was marked, although it was not creased nor folded as if to put in the box. The defendant looked at it, and shewed it or placed it where it could be seen and read by all who were present, and it was so seen and read by all except, perhaps, by McKinnon. The defendant could have prevented its being disclosed to any one. The defendant said it was not spoiled and looked at the statute. The plaintiff contended it was spoiled for him, and Finley said the paper was all right, but it was spoiled in the plaintiff's view.

Judgment.
Falconbridge,
J.

There is a conflict of testimony as to this ; but in this and in other matters of fact in dispute I have been much assisted by the candid evidence of Wilfrid McKay, the Reform scrutineer.

He says the plaintiff meant he had spoiled it by putting the cross in the wrong place ; that he (witness) understood it, and the others did too.

After reading the statute the defendant still refused to give the plaintiff another ballot, saying that the ballot could be conveniently used as a ballot and was not a spoiled one. The plaintiff said if he had known it was not spoiled he would have spoiled it before he handed it in. The defendant put the ballot into the aperture in the box, leaving enough of it projecting to render it capable of being withdrawn, and a little later the constable told the defendant to put it in, which he did by giving it a tap or push, and it went into the box and was afterwards counted as a vote for Richardson, against whom the plaintiff had meant to vote.

There was no doubt or question about the plaintiff's honesty and good faith ; nor was there any room for doubt or misunderstanding as to how the plaintiff claimed he had spoiled the ballot, viz., by inadvertently marking it opposite the name of the wrong candidate ; nor was there

Judgment. any pretence that the defendant or any one in the room
Falconbridge, disbelieved his statement and was not thoroughly satisfied
J. and convinced that he had so inadvertently marked the
paper.

The defendant's statement of the operation of his own mind was that he was endeavouring to do what was right; that he did not honestly believe it was a spoiled ballot; that he thought it was a good one, as there was nothing on its face to indicate otherwise: that he thought it could be "conveniently" used as a ballot under section 109, and the plaintiff did not prove to his (the defendant's) satisfaction that it was a spoiled ballot: that it was a perfectly good ballot on its face: that he thought spoiled ballot meant something on it to identify it, or something of that sort: that his view of the law was that if the plaintiff put his cross opposite the wrong name it was not a spoiled ballot, and he acted on that; after he (the defendant) saw the statute he refused the plaintiff the new ballot intentionally, and he (the defendant) put the ballot in the box intentionally, knowing it was a good ballot that way for Richardson, and it was counted as such; he would assume the plaintiff did not want a spoiled ballot put into the box.

The expression in section 109, "that it cannot be conveniently used as a ballot paper," is one which certainly requires consideration. The side note, leaving out the word "conveniently," is utterly inapt and misleading.

Convenient (*conveniens*, a coming together, a meeting) means fit, suitable, proper, well adapted, commodious, easily used, serviceable; to which must be supplied in each case the preposition by or for, some person or thing or purpose.

"Give me neither poverty nor riches; feed me with food convenient for me."—Prov. xxx. 8.

Conveniently, adverb, is in a convenient manner, commodiously, without difficulty.

"And he sought how he might conveniently betray him."—Mark xiv. 11.

In Anderson's Dictionary of Law it is said: "Whatever

it is the duty of an officer to do in the performance of service enjoined by law, and which may be accomplished by the exercise of reasonable diligence, that he can 'conveniently' do."

Judgment.
Falconbridge,
J.

In *Black v. Buchelder* (1876), 120 Mass. 171, "payable as convenient" in a contract was construed not to mean not payable at all, but only that some indulgence as to length of credit was to be allowed to the debtor.

A place where the works of one person are carried on which occasion an actionable injury to the property of another, is not within the meaning of the law a "convenient" place: *Directors of St. Helen's Smelting Co. v. Tipping* (1865), 11 H. L. C. 642.

Construction of "convenient and necessary" in an Act of Parliament, *Abson v. Fenton* (1823), 1 B. & C. 195. *Per* Maule, J., in *Davis v. Waddington* (1844), 7 M. & G. 37, at p. 44, "the term *conveniens*, there used, meant the same in the time of Queen Elizabeth as it meant in that of Augustus Cæsar, and as it now means in the time of Queen Victoria." And that learned Judge would manifestly not consider the use of the word in the two passages from the Bible quoted above, to be now archaic.

"Conveniently" in the section means "conveniently for the voter and for his wish, purpose, and intention in voting."

One would imagine that there is hardly a more obvious way in which a ballot paper can be "inadvertently dealt with" than by marking it for the wrong candidate; and for the deputy returning officer to hold that because it was good upon its face it did not come within the section, was a cruel and improper deprivation of plaintiff's right of franchise, with the added injury that his vote was actually counted against his candidate and in favour of the enemy.

The sections of the Act, R. S. O. ch. 9, cited are the following: sections 31, 103, 155, 156, 194; Form of Oath (No. 28); Sched. A., Form 13, Form 8, secs. 97, 109, 110, 112, 114, 115, 116, 191.

I have gone carefully through these and consulted the following cases and authorities: *Wilson v. Manes* (1896),

Judgment. 28 O. R. 419; *Walton v. Appjohn* (1884), 5 O. R. 65, 82;
Falconbridge, *Re Young and Harston's Contract* (1885), 31 Ch. D. 168;
J. *Fletcher v. Lord Sondes* (1826), 3 Bing. 501, at p. 580; Max-
well's Interpretation of Statutes, 3rd ed., 372; *Proctor v.*
Manwaring (1819), 3 B. & Ald. 145; *Johnson v. Allan*
(1895), 26 O. R. 550; *Schinotti v. Bumsted* (1796), 6 T. R.
646; *The Oldham Case* (1869), 1 O'M. & H. 151, at p. 163;
Chitty's Statutes, sub. tit. Parliament, 5th ed., vol. 8, p.
177-8; and I have come to the conclusion that the defend-
ant is liable to the plaintiff for three breaches of his duty
as a deputy returning officer: (1) For disclosing the manner
in which the plaintiff had marked his ballot paper; (2) for
not cancelling the ballot paper which had been inadvertent-
ly dealt with; and (3) for having, after he ought to have
been satisfied of the fact of the inadvertence, refused to
deliver another ballot paper to plaintiff; whereas he com-
pelled plaintiff to vote for the candidate whom he wished
to oppose. These breaches the defendant committed
"wilfully" within the meaning of the authorities.

And there will be judgment for plaintiff for one sum of
\$400, for all penalties and damages with costs.

G. F. H.

RE JONES AND CITY OF LONDON.

Municipal Corporations—By-laws—Meeting of Council—Notice of—Notice of Introduction of By-laws—Reading By-laws—Adjournment of Meeting—Quashing By-laws—Discretion.

The notice calling a special meeting of the municipal council of a city at which two by-laws were passed regarding the number of tavern and shop licenses to be granted in the municipality, stated that it was "for the consideration of a by-law relating to tavern licenses :"—

Held, a sufficient notice.

Remarks of CHITTY, J., in *Henderson v. Bank of Australasia* (1890), 45 Ch. D. at p. 337, referred to.

It was objected that notice of intention to introduce the by-laws should have been given, and that they should not have received their three readings in one day, the council's rules of proceeding so providing, with the exception of cases of urgency :—

Held, that these were matters of internal regulation, and subject to the decision of the mayor or chairman of the council, and the only appellate tribunal was the council.

The Municipal Act provides, sec. 275, that "every council may adjourn its meetings from time to time :"—

Held, that a meeting of the council might adjourn temporarily, without a formal motion to adjourn, by the consent of the majority of a quorum present ; and, even if the adjournment in this case, announced by the mayor, was not by the consent of the majority, the validity of an objection grounded on the absence of such consent would be so doubtful that the Court should not, in its discretion, quash the by-laws passed after the adjournment.

THIS was a motion by Francis Alfred Jones for a summary order quashing two by-laws of the municipal council of the city of London, upon grounds stated in the judgment. Statement.

The motion was heard by ROSE, J., in the Weekly Court at London, on the 15th April, 1899.

Talbot Macbeth and *G. N. Weekes*, for the applicant.

T. G. Meredith, for the corporation.

April 24, 1899. ROSE, J. :—

This was a motion to quash by-laws 1133 and 1134, upon four grounds argued without reference to the exact wording of the notice of motion.

By-law 1133 repealed sec. 1 of by-law 769, relating to tavern and shop licenses, passed the 9th January, 1893,

Judgment. limiting the number to thirty-four; and also repealed
Rose, J. by-law 1078, passed on the 18th day of July, 1898.

By-law 1078, as I understand it, increased the number of tavern licenses to thirty-six, but was not acted upon in consequence of the decision of my learned brother Falconbridge in *Re Goulden and City of Ottawa* (1897), 28 O. R. 387, holding that a by-law which was not passed prior to the 1st of March in any year, *i.e.*, in January or February, was invalid.

By-law 1134 provided for the year beginning the 1st May, 1899, and for every license year thereafter until the by-law should be altered or repealed, and limited the number of licenses to thirty-six. This by-law was passed under the provisions of sec. 20 of ch. 245, R. S. O., called "The Liquor License Act." The by-law was considered at a special meeting of the council called for the 27th February, sec. 20 requiring the by-law, if any, to be passed before the 1st March. It was stated by the mayor, who was examined for the purposes of this motion, that, as far as he knew, the reason why the by-law had not been considered before that time, was that the matter had been overlooked.

The notice calling the meeting stated that it was "for the consideration of * * a by-law relating to tavern licenses."

The first objection taken to the by-law, before me, was that the notice of the meeting was not sufficient in form.

This objection was not raised at the meeting. The meeting having convened, there were present fourteen, including the mayor. When the by-law was introduced, Alderman Greenlees objected to the introduction on the ground that the same was new business, and that a notice of the intention to introduce the by-laws should have been given at a prior meeting, and asked for the mayor's ruling. The mayor ruled that the council had the right to consider the by-laws at that meeting; that it was a matter of urgency, as the by-laws, to have any effect, must be passed before the 1st March. From this ruling an

appeal was taken to the council, and the ruling was sustained on a vote of nine yeas to four nays. One of the aldermen, apparently one Wilkie, did not vote, and possibly, judging from what subsequently took place, had left the council chamber. This objection to the introduction of the by-laws is also taken as an objection to the validity.

Judgment.

Rose, J.

The minutes say that a large deputation waited upon the council in opposition to the passage of the by-laws, and several of the deputation were permitted to address the council, and one gentleman was heard on behalf of persons interested in the adoption of the by-laws, and thereupon it was moved and seconded that the by-laws be introduced and be read for the first time, which was carried upon a division of nine to three. Alderman McCallum not having voted, it may be that he also had retired from the council chamber. It was stated that it required ten persons present to make a quorum. The number of councillors, I think, was stated at eighteen. A motion for a second reading having been made, what then took place may be perhaps stated from the applicant's standpoint, as found in the affidavit of Alderman Greenlees, who was one of those voting against the by-laws:—
“ A motion was made at the same meeting for the second reading of the said by-law, whereupon Alderman Winnett and I again protested against the by-law receiving, contrary to the by-law regulating the procedure of the council, more than one reading on one day, and we started to leave the council room. There were at that time in the room only ten aldermen and the mayor, eleven in all, and ten are required to form a quorum. The mayor thereupon called out: ‘I declare the meeting adjourned for ten minutes;’ and he immediately left the chair, and nearly or quite all the members left the council room, not more than two or three remaining. In about ten minutes, ten members and no more, including Alderman McPhillips, who was not present when the meeting broke up, as I have just stated, assembled in the council room and

Judgment. passed or assumed to pass by-law 1133 through its second and third reading, and by-law 1134 through three readings.”

Rose, J.

The statements of the mayor on his examination do not materially vary from those made by Alderman Greenlees, except that the mayor gives his reasons for adjourning. I give his answers, without the questions, as follows: “I adjourned the council myself, without motion, for violating by-law 773. There was a number of people came to the council chamber, appeared inside the railing without being invited, other than the speakers. These men were there to intimidate the aldermen. Some of these speakers were impertinent to the chair, the presiding officer. That is not the sole reason; part of the reason. I thought that those there intimidating the members of the council should be out of there before the by-law was read the second and third time.” The mayor further said he thought every presiding officer had authority inherent in his office to adjourn the council for the purpose, as I understand him, of regulating the proceedings and preserving order. Apparently no objection was taken to the action of the mayor, he stating in his evidence: “I heard none. There was such an uproar at the time I adjourned the council.” He further stated: “I do not think there would be much opportunity (given for objection) for the reason that there was such confusion. I said ‘The council is adjourned’.” Question 114 was: “You immediately left the chair? A. After adjourning. 115. Q. Or almost at the same moment? A. Yes.” This action of the mayor is also taken as an objection to the validity of the by-laws.

The last ground taken is that the number of licenses was increased from thirty-four under by-law 767, to thirty-six, contrary, as it is alleged, to the provisions of sec. 18 of the Liquor License Act, providing that there shall be no increase in any municipality in excess of the number of licenses issued therein for the year ending the 1st May, 1897, until it appears from the census of Canada hereafter made, or any census subsequently taken, as provided by

this Act, that the population of the municipality has increased since the taking of the June census of 1891.

Judgment.

Rose, J.

I have first to consider how far I should give effect to objections founded upon extrinsic evidence, and I am warned by the authorities to proceed with much care and caution. I refer to the cases collected in Robinson & Joseph's Digest, col. 2469 ; and especially to *Sutherland v. Municipal Council of East Nissouri* (1853), 10 U. C. R. 626, where Robinson, C. J., giving the judgment of the Court, refused to interfere with a by-law on the ground that a quorum of the council was not present at its passing, as required by 12 Vict. ch. 81, sec. 168. Although the Courts have not held themselves restricted to the degree suggested by that decision, yet the disinclination to interfere with municipal by-laws good on their face is made manifest by the decision in *Re Lloyd and Corporation of Elderslie* (1879), 44 U. C. R. 235, referring to *Re Secord and County of Lincoln* (1865), 24 U. C. R. 142, and *Grierson v. Municipality of Ontario* (1852), 9 U. C. R. 623.

The principle adopted in *Re Secord and County of Lincoln* is stated by Draper, C. J., as follows (p. 147): "In the words of my late brother Burns, 'I am of opinion that the true construction to give to the powers vested in the Court to quash by-laws is, that unless the by-law be illegal on the face of it, it rests discretionary with the Court upon extraneous matters to say whether there is such a manifest *illegality* that it would be unjust that the by-law should stand, or that it had been fraudulently or improperly obtained.'"

This case differs from the case of *Re Shaw and City of St. Thomas*,* in which I gave judgment on the 12th instant, because there the Municipal Act provided that the by-law should not be valid unless the requirements of the Act were observed. There is no similar provision governing the by-law in this case.

I find here by-laws passed by a majority of the council,

* Not reported. See 18 P. R. 454.

Judgment.

Rose, J.

carrying out the wish of the council as expressed in July, 1898, and also at the special meeting. I have no affidavit filed by any alderman stating that he had not sufficient notice of the object of the special meeting or of the nature of the business to be brought up and that was in fact transacted. No alderman stated that he was absent by reason of any want of fullness in the notice, or that if he had had fuller notice he would have been present to have opposed what was done. Of those that opposed the introduction of the by-laws, one withdrew before the first reading, another apparently withdrew before the adjournment, and I should judge from what appears upon the material that when the adjournment was made the remaining two objectors were in the act of withdrawing from the council chamber for the purpose of breaking up the quorum, Alderman McPhillips having previously left the room.

These objectors, if I am not drawing an incorrect inference, were endeavouring to take advantage of what apparently was a temporary absence of Alderman McPhillips, to prevent the will of the majority passing into law. There has been no fraud or impropriety in the passing of the by-law, as far as the material shews; and the objections to its validity are, it seems to me, purely technical. I think it is my duty, if I can, consistently with the authorities, to support the by-law, and to give effect to what is manifestly the will of the majority of the council, and not to allow a minority by the use of technicalities to prevent what they could not prevent in a regular manner.

The first objection to the sufficiency of the notice I, on the argument, stated in my opinion not to be well founded. I thought that any intelligent man would understand the nature of the business to be brought up, not only by reason of the notice, but by reason of what had previously taken place in the council. And I am glad to find support for the view I then took in the decision of Chitty, J., in *Henderson v. Bank of Australasia* (1890), 45 Ch. D. at p.

337, and I think I may well extract from his judgment the following observations, as being of general importance: “In cases of this kind it is settled that the notice which specifies the business to be done, or the objects of the meeting, is to be a fair notice, intelligible to the minds of ordinary men, the class of men who are shareholders in the company, and to whom it is addressed. The Court does not scrutinise these notices with a view to exercise criticism, or to find out defects, but it looks at them fairly. I think the question may be put in this form: What is the meaning which this notice would fairly carry to ordinary minds? That, I think, is a reasonable test. Another matter of very considerable importance in dealing with this as a practical question is, how did the meeting itself understand the notice? There were questions raised, and discussions at the meeting, but no one raised any objection on the ground that this addition of the words as to the qualification applied to each share, was not within the scope of the notice; and it is plain that the plaintiff, who took an active part in the meeting, did not raise the objection. It is plain he put no one on his guard, either the chairman or any of the shareholders there assembled.” I would adopt this language as peculiarly applicable to the facts of this case, and without repetition state that I am confirmed in the view I took upon the argument that the notice was full and sufficient. The objection that a notice for the consideration of a by-law was not a notice that a by-law might be passed, is, if I may say so hypercritical.

Judgment.

Rose, J.

The second objection was really a double one, although the objection taken in the council does not state both grounds. The first objection is that the by-law should have been introduced on motion, and that notice of intention to introduce it should have been given; and the second part of the objection is that the by-law should not have received its three readings on one day. The rule of procedure under by-law 773 of the council provides as follows: “Every by-law shall be introduced on motion

Judgment. for the first reading thereof, and shall receive three several
Rose, J. readings, each on different days, previous to its being passed, except on urgent and extraordinary occasions, when it may be read twice or thrice on one day."

Rule 29 provides: "Notice shall be given of all motions for introducing new matters * * and no motion shall be discussed unless such notice has been given at the last regular meeting of the council."

Rule 11 provides: "That the mayor or other presiding officer shall preserve order and decorum and decide questions of order subject to an appeal to council."

Rule 12 provides: "When the mayor or other presiding officer is called on to decide a point of order or practice, he shall state the rule applicable to the case, without argument or comment."

And in *Re Indian Zoedone Co.* (1884), 26 Ch. D. at p. 77, in the Court of Appeal, the Earl of Selborne, L. C., stated that a chairman of a meeting "has *prima facie* authority to decide all emergent questions which necessarily require decision at the time."

It seems to me that these were matters of internal regulation, and subject to the decision of the mayor, and that the only appellate tribunal was the council. The mayor determined that this was an urgent occasion; and in this I should agree, because it was manifest that if the by-law was not passed at that meeting, it could not be passed at all during that year. The mayor also determined in effect that this was not new matter, and that it was not necessary to give a notice of the intention to introduce the by-law. I do not know whether he was right or wrong. I do not know what is meant by "new matter" in the by-law. I certainly do not consider myself competent to reverse him or the council upon the conclusion they came to, even if it were within my province to do so. I think it is not within my province, and that these objections fail.

The third objection has given me much more trouble. I have examined all the cases to which I have been

referred, or which I have been able to find, as to the right of a chairman to adjourn a meeting. The Municipal Act provides, sec. 275 : "Every council may adjourn its meetings from time to time." This differentiates this case from others to which I shall refer, where either nothing was said as to who had the power to adjourn, or where the power was vested in the chairman subject to the consent of the meeting. The first case that I have referred to is *Stoughton v. Reynolds* (1736), 2 Str.1045, where Hardwicke, C.J., said, referring to the power to adjourn : "The power must arise from the custom, or common law. Here is no custom found, and I know of no book that shews how it stands at common law. As to the vicar, he seems to have no share in the election of the second churchwarden, nor to have any right to preside. Is the right of adjourning in the churchwardens ? There is no case for that ; though if there was, this is found to be the act of one only. We must therefore resort to the common right, which is in the whole assembly, where all are upon an equal foot. And though there may be a difficulty in polling for an adjournment, yet as there is no other way, that must be taken. It would be giving the vicar too much influence, to fix it in him and his churchwarden."

This case was referred to in *The Queen v. D'Oyly* (1840), 12 A. & E. at p. 160, where Lord Denman, C.J., said : "The case of *Stoughton v. Reynolds* is a good authority, but should not be pressed to the extent to which the argument in support of this rule would carry it. As it has been explained, it does not decide that the rector may not adjourn the meeting, but only that, if he has done it so as to disturb the proceedings, the Court will interfere." In *The Queen v. D'Oyly* the learned Chief Justice expressed the following opinion, at p. 159 : "Setting aside the inconvenience that might arise if a majority of the parishioners could determine the point of adjournment, we think that the person who presides at the meeting is the proper individual to decide this. It is on him that it devolves, both to preserve order in the meeting, and to regulate the

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Rose, J.

Judgment.

Rose, J.

proceedings so as to give all persons entitled a reasonable opportunity of voting. He is to do the acts necessary for these purposes on his own responsibility, and subject to the being called upon to answer for his conduct if he has done anything improperly."

The Queen v. D'Oyly is cited in Buckley on the Companies Acts, 7th ed., p. 519, as authority for the following propositions: "There is at common law a right of adjournment of a public meeting, and *semble* it lies in the chairman."

The question came up in *Salisbury Gold Mining Co. v. Hathorn*, [1897] A. C. 268. There, however, there was an article of the association providing: "The chairman may with the consent of the members present at any meeting adjourn the same from time to time and from place to place," etc. And Lord Herschell said: "According to the terms of art. 66 it is the 'chairman' who may adjourn the meeting: it is to be his act, not that of the meeting or of those present at it. He cannot, it is true, adjourn it of his own mere motion, but the terms in which the members present are given a controlling voice strengthens the view that the adjournment is to be the act of the chairman."

In the argument in this case, *The Queen v. D'Oyly*, *supra*, *MacDougall v. Gardiner* (1875), 1 Ch. D. 13, and *National Dwellings Society v. Sykes*, [1894] 3 Ch. 159, were referred to. In the last case Chitty, J., held that it was not within the scope of the chairman to stop the meeting at his own will and pleasure, and if he withdrew from the chair for the purpose of stopping the meeting improperly, the meeting by itself could resolve to go on with the business for which it had been convened, and appoint a chairman to conduct the business.

Having regard to these authorities, I should say that the power here was in the meeting to adjourn, but I find nothing in the rules of order in terms saying that the adjournment must be upon formal motion, although possibly it is a fair inference to be taken from the rules,

that the ordinary procedure for the adjournment of the meeting would be upon motion. But, having regard to the duties vested in the chairman to preserve order and to regulate the proceedings, I see no reason why he should not ask the council at any time whether, in the opinion of the members, it would not be better to adjourn, and upon an expression of opinion by the council in favour of an adjournment, why he should not declare an adjournment. And if his suggestion was opposed by some and carried only by a majority vote, I see no reason why an adjournment might not validly take place without the formality of a motion. And I think that that is what substantially was done here. There was a quorum present when he announced the adjournment; certainly a majority of those present were in favour of the adjournment for the ten minutes, because we find them in their places upon the expiry of the ten minutes. The two recalcitrant members, who were probably in the act of retiring when the adjournment was announced, for the purpose of breaking up the quorum, certainly did not object; perhaps it might be fairly said that they had little opportunity to object; but the fact remains that they did not object; and, as, by the last clause of the by-law regulating the proceedings, it is stated that "in all unprovided cases in the proceedings of council or in committee, resort shall be had to the law of Parliament as the rule for guidance on the question, and in such cases the decision of the mayor or other presiding officer shall be final and acquiesced in without debate," and it is clear from one's knowledge of the procedure in Parliament that as long as a member is within the precincts of the House he may be counted in ascertaining whether a quorum is present, so here, there being a sufficient number of members within the council chamber, it is manifest there was a quorum present when the adjournment took place.

Then, again, the members who composed the quorum upon the reassembling at the expiry of the ten minutes, were members who had been present during the prior

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proceedings. The fact that Alderman McPhillips was absent at the very moment of the adjournment makes, I think, but little difference. His absence has not been explained upon the material, but it is probable that he was not far distant, for we find that he was present when the council resumed upon the expiry of the ten minutes.

But, even if I am in error in my view that this was an adjournment by the consent of the majority of a quorum present, the validity of the objection is too doubtful to make it proper for me to act upon it to quash the by-law. Here, I think, the discretion which is vested in me should be exercised to sustain the by-law against such an objection, an objection not founded in merit nor, as it seems to me, sustained by law.

The remaining objection was as to the increasing of the number of licenses beyond the limit provided for by by-law 769, namely, from thirty-four to thirty-six. I have looked through the material before me, and I find that there is no evidence at all which sustains the objection. The only facts I have before me are that by-law 769, passed in 1893, limited the number to 34, and that by-law 1134 limits the number to 36. It has not been made to appear to me whether any census has been taken since 1897, or whether the facts upon which the right of the commissioners to act exist under sec. 19. Sub-sec. 3 of sec. 19 provides for a census to be taken by a municipality. I do not know whether there has been any such census taken. It was stated in argument that there had been a large increase in the area of the municipality by the bringing in of London West. I do not know what steps were taken subsequently upon such increase. This objection is not sustained in fact. If I have overlooked any evidence on this point, I may be spoken to prior to the order issuing.

The motion fails on all the grounds, and must be dismissed with costs.

E. B. B.

CLAPPERTON ET AL. V. MUTCHMOR.

Bankruptcy and Insolvency—Proof of Claim—Promissory Note—Indorser—Incomplete Instrument—Suretyship—Maturity after Assignment for Creditors.

The plaintiffs, being creditors of an incorporated company, accepted an offer made by the company's president, in a letter addressed to the plaintiffs to "personally guarantee payment" of the company's debt, upon an extension of time being given, and, in order to carry out the arrangement, promissory notes were made by the company payable to the order of the plaintiffs, and indorsed by the president, who made an assignment for the benefit of his creditors, under R. S. O. ch. 147, before the maturity of three of the notes, in respect of which the plaintiffs sought to rank upon his estate in the hands of the defendant as assignee :—

Held, following *Jenkins v. Coomber*, [1898] 2 Q. B. 168, that, upon the Statute of Frauds, no action could be maintained on the notes against the president, as to whom the instrument was incomplete.

And although the correspondence and the notes taken together established an agreement of suretyship, notwithstanding the Statute of Frauds, yet proof could not be made upon such a contract when the notes guaranteed had not matured at the date of the assignment.

Grant v. West (1896), 23 A. R. 533, and *Purefoy v. Purefoy* (1681), 1 Vern. 28, followed.

THIS action was brought by William Clapperton & Co. Statement. against A. P. Mutchmor, assignee under R. S. O. ch. 147 of the estate of P. Rochon, for a declaration of the plaintiffs' right to rank upon the estate of Rochon in the hands of the defendant Mutchmor, in respect of the amounts due upon promissory notes, under the following circumstances.

In July, 1897, the Mercantile Syndicate Company (Limited) were indebted to the plaintiffs. Rochon, the president of the company, at this time represented to the plaintiffs that the company were in financial difficulties, and interested himself in arranging with the creditors of the company, and with the plaintiffs among others, for an extension of time for the company to meet their liabilities, and wrote a letter to the plaintiffs, dated 29th July, 1897, in which he said that the company found themselves unable to meet the plaintiffs' account at maturity, "and having the signature of all the principal creditors to the following offer, they respectfully submit the same to yourselves, being an extension of time with-

Statement. out interest in equal payments in 3, 6, 9, 12 months. In consideration of all creditors accepting this offer, I will personally guarantee payment." The plaintiffs answered on the 31st July, 1897: "We will accept notes at 3, 6, 9, and 12 months for our account, as you request, provided same are indorsed by yourself."

As a result of this correspondence, four promissory notes, all dated the 2nd August, 1897, were made by the company payable in 3, 6, 9, and 12 months after date, to the order of the plaintiffs, and there was indorsed on each the signature of P. Rochon, and in this form the notes were received by the plaintiffs, and pending their maturity the plaintiffs refrained from asking for payment of their original claim against the company.

The note which matured on the 5th November, 1897, was paid at maturity. The remaining three notes, of which the plaintiffs were the holders, were dishonoured at maturity, but were not protested, and they remained unpaid when this action was brought.

On the 26th January, 1898, Rochon assigned all his estate to the defendant for the benefit of his creditors under the provisions of R. S. O. ch. 147.

On the 29th January, 1898, an order was made under R. S. C. ch. 129 directing the winding-up of the Mercantile Syndicate Company (Limited).

In February, 1898, the plaintiffs filed with the defendant a claim for \$406.95 "for promissory notes made by the Mercantile Syndicate Company (Limited) to the order of P. Rochon and Company, and by them indorsed for value and delivered to said claimants."

In August, 1898, the defendant gave the plaintiffs notice of contestation under R. S. O. ch. 147, sec. 22.

In September, 1898, after the maturity of the notes, the plaintiffs filed with the defendant a further claim, it being agreed that such further claim should be taken in substitution for that formerly filed, and that the notice of contestation should apply to both.

The further claim was as follows:—

“The above named debtors are justly and truly indebted to the said claimants in the sum of \$406.95. The said claim is upon a written guarantee, dated 29th July, 1897, addressed to the claimants, signed by the said P. Rochon, guaranteeing payment by him to said claimants of the then indebtedness of the Mercantile Syndicate Company (Limited) to said claimants, the balance whereof still remaining unpaid amounts to the said sum of \$406.95, payment of which said sum is also secured by the promissory notes mentioned” in the former claim. Statement.

The action (and two others of the same character brought against the same defendants by creditors named Garneau and Lonsdale) were tried together at Ottawa before BOYD, C., without a jury, on the 15th April, 1899.

Belcourt and R. V. Sinclair, for the plaintiffs.

G. F. Henderson, for the defendant.

April 25, 1899. BOYD, C. :---

Upon the Statute of Frauds I think this claim is governed by *Jenkins v. Coomber*, [1898] 2 Q. B. 168, so that no action can be maintained upon the note as against Rochon; as to him the instrument was incomplete, and, while it may be used as a piece of evidence going to shew a contract of indemnity in respect of the makers of the note, it cannot be used against him as a negotiable instrument on which he is liable as indorser.

I think that the correspondence and the state of facts does sufficiently connect the writings so as to establish an agreement of suretyship, notwithstanding the Statute of Frauds. But then the question arises whether proof can be made on such a contract upon this estate when the notes guaranteed had not matured at the date of the assignment. The Act must now be read as limited to cases of debtor and creditor, and I take it that such relationship must subsist at the date of the assignment. That seems to be implied from the language used in *Grant v.*

Judgment. *West* (1896), 23 A. R. 533. The Chief Justice says as to the Act, now R. S. O. ch. 147 : "The legislation is as to a debtor, *i.e.*, in such circumstances that he cannot pay his debts. Creditors are the persons to whom he is indebted : " p. 537. And Mr. Justice Osler says : " A claim for damages, the liability for which has not been adjudicated at the time of the assignment, and depends upon the result of an action, seems to be quite outside any reasonable construction of this language : " pp. 539-540. The same is held in *Purefoy v. Purefoy* (1681), 1 Vern. 28.

There was no debt in this case at the time of the assignment. There would be no debt till the notes matured and default arose in their payment by the company. Though this time has now elapsed, and all the notes are overdue and unpaid, still I do not think that the status of creditor obtained after the assignment can entitle the plaintiff to rank with those who were creditors at the date of the assignment. The estate transferred was for the benefit of those then creditors, and not of others who might become so by changed conditions in the future. Section 20, sub-sec. 5,* would apply to the claim, if it were possible to base it upon the negotiable instrument, but, as I have said, this attitude is repugnant to the case first cited.

The plaintiffs' claim is outstanding against Rochon, but cannot be proved, in my opinion, against his estate.

The costs of one test action should be paid to the assignee by the three plaintiffs.

E. B. B.

* If a creditor holds a claim based upon negotiable instruments upon which the debtor is only indirectly or secondarily liable, and which is not mature or exigible, such creditor shall be considered to hold security within the meaning of this section, and shall put a value on the liability of the party primarily liable thereon as being his security for the payment thereof ; but after the maturity of such liability and its non-payment, he shall be entitled to amend and revalue his claim.

STEWART V. OTTAWA AND NEW YORK R. W. CO.

Railways—Expropriation of Lands—"Owner"—Person in Possession—Title—Jus Tertii—51 Vict. ch. 29, sec. 103 (D.).

By sec. 103 of the Railway Act of Canada, 51 Vict. ch. 29, the lands which may be taken without the consent of the owner shall not be more than 650 yards in length by 100 yards in breadth.

The defendants desired to use for their railway a tract of land more than 650 yards long of which the plaintiff was in possession, and they alleged that a strip in the middle of the tract was ordnance land of the Crown, and therefore sought to expropriate two pieces, one on each side of the alleged ordnance reserve, which latter the plaintiff claimed as his own by length of possession :—

Held, that the scheme of the Act is that the company shall deal with the person in possession as owner, and if the company propose to disturb that possession, it must be pursuant to the powers conferred by the Act; the matter of title is to be held in abeyance until a later stage in the expropriation proceedings. The company cannot, even in the case of defective title, ignore the person who actually occupies the land as owner, and proceed as if his interest had been duly invalidated by legal process on the part of the real owner. Though part of the land be held by a precarious tenure, yet where there is possession of the whole as one property, there should be but one set of proceedings and one arbitration, and the whole should be dealt with under the statute as the property of one and the same owner.

THIS was an action for an injunction to restrain the defendants from entering upon and taking a portion of the plaintiff's farm for the purposes of their railway. The facts are stated in the judgment. An interlocutory injunction had been granted until the trial, which took place before BOYD, C., without a jury, at Ottawa, on the 17th April, 1899. Statement.

Osler, Q.C., and *Wyld*, for the plaintiff.

D'Arcy Scott, for the defendants.

April 24, 1899. BOYD, C. :—

The extremest limits of lands which may be taken without consent of the owner are given in sec. 103*

*103. The lands which may be taken without the consent of the owner thereof shall not exceed thirty-three yards in breadth, but in places where the railway is raised more than five feet higher or cut more than five feet deeper than the surface of the line, or where offsets are established, or where stations, depots or fixtures are intended to be erected,

Judgment. of the Railway Act, 51 Vict. ch. 29 (D.). When needed
Boyd, C. for depots or fixtures, as contended in the present case, the piece may be 650 yards in length by 100 yards in breadth. If more is required, authority to extend the area must be obtained from the Minister. No such authority is proved here.

But it is proved that the plaintiff is in possession of a continuous tract of land, being the front of farm property, which is of greater length than 650 yards. There is some conflicting evidence as to the title of a strip in the middle of the tract, which the defendants allege is ordnance property of the Crown, and the plaintiff counter-alleges that it is his by length of possession. The railway company seek to keep within the measure of the statute by claiming to expropriate two pieces, one on each side of the alleged ordnance reserve. The plaintiff asserts that this is a method of evading the statute, as he is owner in possession of the whole, within the meaning of the Railway Act. I think that is the rightful position as between these litigants.

"Owner" is defined by sec. 2 (*p.*), as any person who, under the provisions of the Act, would be enabled to sell and convey lands to the company. And sec. 136 declares that "all persons whomsoever" seized, possessed of, or interested in any lands, may contract and sell and convey to the company all or any part thereof. And the next section provides that in cases where such persons have no right in law to sell or convey the rights of property in the land, they shall obtain from a Judge the right to sell, after due notice to the persons interested.

The scheme of the Act appears to be to deal with the person

or goods to be delivered, the lands which may be taken without the consent of the owner shall not be more than six hundred and fifty yards in length by one hundred yards in breadth, except where more ample space for the accommodation of the public, or of the traffic on the railway, or for protection against snow drifts is required—in which cases such greater quantity of land or land covered with water may be taken, as the Minister authorizes.

in possession (see 59 Vict. ch. 9, sec. 3, (D.)) as owner, and if the company propose to disturb that possession, it must be pursuant to the powers conferred by the Act. The matter of title is to be held in abeyance until a later stage in the expropriation proceedings. It may be that more complication will arise in the case because of the *jus tertii* imputed to the Crown in respect of a section of the strip of land now in dispute. Such adverse claims can be safeguarded at the proper time, as is fully discussed *quoad* the Crown in *Re Manor of Lowestoft and Great Eastern R. W. Co.* (1883), 24 Ch. D. 253; see also *Re Alston's Estate* (1857), 5 W. R. 189, and more fully 28 L. T. O. S. 337.

Judgment.
Boyd, C.

But at present I am not to decide on the ownership of the Crown at the instance of the railway company. They cannot prejudice the title of the plaintiff by taking expropriation proceedings, which deal mainly and immediately with the possession of the land. I think the English authorities shew that the company cannot, even in the case of defective title, ignore the person who actually occupies the land as owner, and proceed as if his interest had been duly invalidated by legal process on the part of the real owner. This position is recognized by Hall, V.-C., in *Ex p. Winder* (1877), 6 Ch. D. at p. 703, where he intimates that the man in possession can hold against the railway company, if they do not observe the directions of the statute. So, in *Re Alston's Estate* (1857), 5 W. R. 189, payment for the property expropriated was ordered to one who claimed to be in possession of part of the foreshore as against the Crown.

Putting it in another way, though part of the land, in this case the intermediate part, be held by a precarious tenure, still where there is possession of the whole as one property, there should be but one set of proceedings and one arbitration, and the whole should be dealt with under the statute as the property of one and the same owner: *Holt v. Gas Light and Coke Co.* (1872), L. R. 7 Q. B. 728.

Since this action began, the Crown has given license to

Judgment. the defendants to use certain track limits over the intermediate piece of land, but this is far from being such an authority as is contemplated by the last part of sec. 103.

Boyd, C.

I conclude, therefore, that the defendants cannot, without the consent of the plaintiff, seek to enter upon and take the whole strip in his possession as and for their buildings, etc., because it is in excess of the quantity permitted by the Act, and they cannot be allowed to evade the provisions of the statute by severing the property of the plaintiff, as occupied by him, according to their own ideas of what his title and legal rights may be in the whole.

Upon this ground the injunction should be continued, and costs given to the plaintiff.

E. B. B.

COPE V. CRICHTON ET AL.

Equitable Estate—Assignment of Interest in Land—Title—Right to Possession—Subsequent Mortgage—Notice—Registry Laws—Limitation of Actions—Commencement of Statutory Period—Tenancy at Will.

The plaintiff's father, being in possession of a farm under an unregistered agreement for the sale thereof to him, assigned the agreement and all his interest thereunder by way of security to one who gave a bond to reassign upon repayment of a small sum advanced. Neither the assignment nor the bond was registered. The money was repaid, but there was no reassignment. Subsequently, on the 3rd April, 1886, the father assigned all his interest in the land to the plaintiff for valuable consideration, the plaintiff having no notice or knowledge of the previous assignment. This assignment was duly registered. The plaintiff lived on the farm with his father and mother, whom he had covenanted to maintain during their lives, until July, 1888, when he went away, leaving his parents on the farm, with no definite agreement or understanding, but with the expectation, as he said, that they would remain on the place and make the last two payments under the original agreement, and that when this was done the place would be his. In February, 1891, the father mortgaged the land to the person who had made the first advance, to secure a larger sum, and the mortgage deed was registered. A few days later the original vendor conveyed the land to the father, the purchase money having been paid in full, and the conveyance was registered. In February, 1892, the mortgagee died. In September, 1893, the plaintiff's father conveyed the land absolutely to the administrator of the mortgagee's estate, and this conveyance was also registered.

In an action against the administrator and the plaintiff's father to recover possession of the land and for a declaration that the last mentioned conveyance was void and a cloud upon the plaintiff's title :—

Held, that the assignment to the plaintiff in 1886 gave him an equitable estate in fee and the right to possession, and after its execution, the father and son both being on the place, the possession would be attributed to the son.

2. That the registration of that assignment constituted notice to the mortgagee, and the mortgage did not affect the plaintiff's title or right to possession.
3. That after the plaintiff went away in July, 1888, his father had possession under him as tenant at will, and his tenancy did not terminate until July, 1889, and therefore the Real Property Limitation Act had not barred the plaintiff's right at the time this action was begun in 1898.
4. That the plaintiff, having the equitable title and having the owner of the legal estate before the Court, was entitled to recover possession of the land.

THIS was an action for the recovery of land tried before *Statement.*
FERGUSON, J., without a jury, at Guelph, on the 30th and 31st March, 1899. The facts are stated in the judgment.

Shepley, Q.C., and Secord, for the plaintiff.

W. R. Riddell, and A. Fasken, for the defendant Crichton.

J. E. Day, for the defendant Cope.

Judgment. April 24, 1899. FERGUSON, J.:—

Ferguson, J.

Action for the possession of lands—the north-west half of the north-east half of lot No. 26 in the 5th concession of the township of East Garafraxa in the county of Wellington—and for a declaration that a certain conveyance of the same lands, from John Thomas Cope, the father of the plaintiff, to the defendant Crichton, is fraudulent and void as against the plaintiff and a cloud upon the plaintiff's title. John Thomas Cope is a party defendant.

In the year 1880 the Ontario Loan and Debenture Company were mortgagees of this land, having a power of sale. Both parties claim under the company, that is, through their title, and no question is raised as to the right of the company to sell and convey the land for an estate in fee.

On the 5th day of November, 1880, this company entered into an agreement with the defendant John Thomas Cope to sell and convey the lands to him, for the price or sum of \$1,000, the same to be paid by annual instalments of \$100 each. This agreement contains a provision that the purchaser should be entitled to possession from the date of the same until default in payment. There was no default in payment; at least none that was sought to be taken advantage of by the company.

Under this agreement John Thomas Cope went into possession of the land. The agreement was, however, not registered.

On the 1st day of March, 1883, John Thomas Cope sold and assigned his interest in the land and the agreement to the late David Crichton, the administrator of whose estate the defendant Crichton is, to secure the sum of \$100. This assignment is in form absolute, but on the same day (at the same time) a bond was given by Crichton to Cope conditioned that upon payment of the \$100, with interest thereon, within the period of two years there should be a re-assignment to John Thomas Cope of all the

interest taken by Crichton under the assignment to him. Judgment.
On this bond there is an extension of the time for the Ferguson, J. payment of the \$100 for one year. This is dated the 28th March, 1885, and signed by Crichton. There is another indorsement on this bond indicating that the money was paid in full on the 19th November, 1885. Neither the assignment nor the bond was registered. A question arose at the trial as to whether this money had, in fact, been paid. I do not know that, in the circumstances, this question is a material one. Expert evidence in regard to the handwriting was, however, adduced, and a witness was called who said that she saw \$100 paid by Cope to Crichton in her house and some writing done on the back of a paper at the time. She said this was in the year 1885, and that she saw Crichton counting the money. I think the weight of the evidence on the subject is in favour of a finding that the money was paid in 1885, and, I find accordingly. There was, however, no reassignment from Crichton to John Thomas Cope.

On the 3rd day of April, 1886, an indenture was entered into between the plaintiff and his father, John Thomas Cope, whereby the father, John Thomas Cope, granted, assigned, transferred, set over, and quitted claim unto the plaintiff and his heirs and assigns forever, all the estate, right, title, interest, claim, and demand of him, the said John Thomas Cope, of, in, to, or out of this land, and also his contract with the Ontario Loan and Debenture Company for the purchase of the same and all his "rights, covenants, claims, and demands therein and thereunder," to have and to hold unto the plaintiff, his heirs and assigns, to his and their use forever. And, in consideration of this, the plaintiff, by the same indenture, entered into a covenant with the said John Thomas Cope, his father, and Elizabeth Cope, his mother, and the survivor of them, that he, the plaintiff, would keep, support, clothe, and maintain them, the said John Thomas Cope and Elizabeth Cope, during their natural lives and the survivor of them during his or her life.

Judgment. This indenture was duly registered on the 9th April, Ferguson, J. 1886.

On the 14th day of February, 1891, John Thomas Cope executed a mortgage upon the same land to the late David Crichton to secure the sum of \$1,205, as stated in the document, with interest. This sum was made payable at the expiration of ten years from the date of the mortgage, with interest yearly meantime. This mortgage appears to have been duly registered on the 17th day of February, 1891.

On the 25th day of February, 1891, the Ontario Loan and Debenture Company executed a conveyance in fee of the land to the said John Thomas Cope, the company having been paid their purchase money in full. This appears to have been registered on the 16th day of April, 1892.

And on the 16th day of September, 1893, John Thomas Cope executed a conveyance in fee of the land to the defendant Crichton, who, as before stated, was and is the administrator of the estate of the late David Crichton. This appears to have been duly registered on the 18th day of September, 1893. It was admitted that the elder David Crichton died on the 22nd day of July, 1893. No question was raised as to the grant of administration of his estate to the defendant Crichton.

Upon the execution of the indenture of the 3rd day of April, 1886, the plaintiff became entitled to an equitable estate in fee in these lands and to the right of immediate possession of the lands, and the question now is as to whether or not his rights have in any way been defeated or come to an end.

After the execution of this indenture of the 3rd day of April, 1886, John Thomas Cope had no right or power to make any valid grant or conveyance of or in respect to these lands so as to defeat the plaintiff's rights or estate taken under this indenture, and, when he professed to make the mortgage of the 14th day of February, 1891, to the late David Crichton, he did so not having any right or

power so to do, and the late David Crichton took this mortgage with notice of the plaintiff's rights and estate taken by him under the indenture of the 3rd April, 1886. Judgment.
Ferguson, J.

It was contended that the Registry Act did not apply to the case, and that the registration of this indenture did not constitute notice to him, the late David Crichton; but I am not of this opinion, and I think the registration did constitute notice to him, the late David Crichton, and that in law he had such notice when he took the mortgage; and for these reasons I am of the opinion that the granting or accepting of this mortgage did not affect the plaintiff's equitable title or his right to possession of the lands.

I do not think that either of the cases *Nevitt v. McMurray* (1886), 14 A. R. 126, or *McMillan v. Munro* (1898), 25 A. R. 288, lays down any rule governing this case, so far as notice by reason of the registration of the indenture of the 3rd April, 1886, has concern.

The company should not have granted the lands to John Thomas Cope, as they did by the deed of the 25th day of February, 1891; but they having done so and passed the legal estate, their grantor, John Thomas Cope, became a trustee of the legal estate for the benefit of the plaintiff, and not for the benefit of the mortgagee or supposed mortgagee, the late David Crichton; and there the matter rested till the 16th day of September, 1893, when John Thomas Cope made a conveyance of the land to the defendant Crichton, who, as before stated, was the administrator of the estate of the late David Crichton. This last mentioned conveyance cannot have affected the plaintiff's rights, because the grantor had no power to make it, and it was taken by the defendant Crichton with notice of the indenture, the grant and transfer of the 3rd April, 1886, from John Thomas Cope to the plaintiff, by reason of the due registration of this indenture; so that, as far as the various conveyances have concern, I am of the opinion that the equitable estate and right of possession taken by the plaintiff under the indenture of the 3rd April, 1886, have not been defeated or disturbed.

Judgment. Evidence of certain correspondence between the late Ferguson, J. David Crichton and the Ontario Loan and Debenture Company, and entries in the books of the latter, was offered by the defence for the purpose of shewing that a large part of the purchase money was in fact paid to that company by him, the late David Crichton. This was objected to by counsel for the plaintiff, by what was called a "strenuous" objection. It was received subject to such objection, and cross-examination allowed, without waiver. I am now of the opinion that this evidence was not good evidence as against the plaintiff, who had no knowledge of it or anything to do with it. But I am also of the opinion that it was not material.

I find that the agreements alleged in the 7th and 8th paragraphs of the statement of defence of the defendant Crichton have not nor has either of them been proved.

So far as it may be material (and in the view that I have taken of other elements of the case, I do not think it at all material), I find that at the time of the execution of the indenture of the 3rd day of April, 1886, the plaintiff had not any notice or knowledge of the assignment to the late David Crichton of the 1st day of March, 1883, and, in my opinion, the indenture of the 3rd day of April, 1886, was for good and valuable consideration. I think this plainly appears on the face of the document.

I am of the opinion that no estoppel by conduct, such as is mentioned in the 11th paragraph of the statement of defence of the defendant Crichton, has been shewn by the evidence; and I do not think there is any evidence shewing that the plaintiff authorized his father to deal with the land as his agent, as alleged in the 12th paragraph of the same statement of defence of the defendant Crichton. My finding is for the plaintiff and against the contention of the defendant Crichton on each of these subjects.

As to the defence of the Statute of Limitations pleaded by the defendant Crichton. It appears that the plaintiff was living on the land in question with his father when the indenture of the 3rd April, 1886, was executed, and that he

continued to live there till the end of the month of July, 1888. After the execution of that indenture the possession, when in fact the two were on the place, would be attributed to the one who had the right to possession, the plaintiff, and he was working the farm and out of the proceeds making payments, as he supposed, of the purchase money. The plaintiff and his parents living there was, as it seems to me, in accordance with the plaintiff's covenant in the indenture for the support of his father and mother.

The plaintiff in his examination for discovery, which was in part read by the defence, says in such part that when he left the place in 1888 he thought his parents would remain on the place and make the last two payments, and that when this was done the place would be his. No doubt the plaintiff was, at all events as against his father, entitled by virtue of the contract between the two to the possession of the land, and when he was leaving the place at the end of July, 1888, he left his father in possession with, so far as I can see, no very definite agreement or understanding, but with the expectation that he states. His father then had possession under the plaintiff, which in the circumstances was, I think, looking at all the evidence on the subject, a tenancy at will, which tenancy did not terminate till the expiration of one year from the end of July, 1888, and this being so, the plaintiff was in possession of the land by himself or his tenant till a point of time within ten years before the commencement of this action, the 16th day of September, 1898.

For these reasons I am of the opinion that my finding and judgment should be against the defendant Crichton on the issue raised on this plea.

I am of the opinion that it has not been shewn that anything happened or occurred that had the effect of defeating or impairing the equitable title taken by the plaintiff under the indenture of the 3rd April, 1886, and, as I understand the recent cases on the subject, a plaintiff having the equitable title and having, as in this case, the owner of the legal estate before the Court, may recover possession of the land.

Judgment.
Ferguson, J.

Judgment. I am of the opinion that there should be judgment for Ferguson, J. the plaintiff for the possession of the land, and a declaration that the deed from John Thomas Cope to the defendant Crichton is void, as against him, and a cloud upon his title.

The plaintiff asks also an account of the rents and profits of the land chargeable against the defendant Crichton. I suppose what is referred to is mesne profits. I think the plaintiff is entitled to this account. Reference to the Master at Guelph. I also think the plaintiff is entitled to the costs of the action.

There will be judgment for the plaintiff as above with costs.

Order accordingly.

E. B. B.

[DIVISIONAL COURT.]

RE GILES

v.

THE CORPORATION OF THE VILLAGE OF WELLINGTON.

Mandamus—Municipal Corporation—Unnecessary Relief—Farm Lands—Assessment of—Exemption—By-law—R. S. O. ch. 224, sec. 8, sub-sec. 2.

A writ of mandamus will not be granted when if issued it would be unavailing, or where there is no necessity for the relief.

When it appeared on the evidence that certain farm lands were not charged or assessed for any of the purposes mentioned in sub-sec. 2 of sec. 8, ch. 224 R. S. O., a mandamus directed to the reeve and councillors of a village to pass a by-law declaring what part of the farm lands should be exempt or partly exempt from taxation for such expenditure was refused.

Judgment of ARMOUR, C. J., reversed.

Statement. THIS was an appeal from an order of ARMOUR, C.J., which is set out in the judgment of FERGUSON, J., where the facts also appear, granting a mandamus directed to the reeve and councillors of a village to pass a by-law declaring what part of certain farm lands should be exempt or partly exempt from taxation for certain expenditure mentioned in sub-sec. 2, sec. 8, ch. 224 R. S. O.

The appeal was argued on the 10th January, 1899, *Argument.* before a Divisional Court composed of FERGUSON, ROSE, and ROBERTSON, JJ.

Aylesworth, Q.C., for the appeal, contended that on the evidence the council considered the lands were benefited, and, if so, there was no obligation on the council to pass any by-law: and that from the exercise of the discretion not to pass, there was no appeal: that no mandamus should direct them as a deliberative body what judgment, they should pronounce: and that the application was too late.

Clute, Q.C., *contra*, contended that where, as here, the farm lands were in a village, the presumption was that they were not as much benefited as the village lots: that the plaintiff was entitled to the judgment of the council as to whether the lands were benefited or not: that the council could not remain quiescent and do nothing: that they must pass a by-law or take some action on which an appeal could be had: and that if they would not do so, the Court should move them.

Aylesworth, in reply.

March 4, 1899. FERGUSON, J.:—

This is an appeal from an order bearing date the 25th day of November, 1898, made by the Chief Justice of the Queen's Bench, which is as follows:—

“It is ordered that the reeve and councillors of the corporation of the village of Wellington do forthwith, in accordance with ch. 224 of the Revised Statutes of Ontario (1897), section 8, pass a by-law declaring what part of lot number six on Main street, in the village of Wellington, in the county of Prince Edward, consisting of one hundred and forty acres, and being the lands assessed to the plaintiff and one Willard N. Giles, as lots numbers 83 and 84, for \$5,600 on the assessment roll of the said corporation of the village of Wellington for the year 1897, held and used

Judgment. as farm lands only, shall be exempt, or partly exempt, from taxation for the expenditure of the municipality, the said corporation of the village of Wellington, incurred for waterworks, whether for domestic use or fire protection or both, the making of sidewalks, the construction of sewers or the lighting and watering of the streets, regard being had in determining such exemption to any advantages, direct or indirect, to such lands arising from such improvements or any of them."

- . On the 21st day of May, 1898, these two Giles's gave notice to the corporation and council to pass a by-law exempting this property from local or public improvement under sec. 7a of the Consolidated Assessment Act, 1892, 55 Vict. ch. 48 (O.): such notice stating that if the by-law were not passed exempting the property they would move for a mandamus compelling the passage of it, claiming that the property was exempt, and further, that if the by-law were passed exempting the property in part, they required to be given a copy of it in sufficient time to allow an appeal.

By section 8, mentioned in the order, it is provided that when in any town or village there are lands held and used as farm lands only and in blocks of not less than five acres, by any one person, such lands shall be assessed as farm lands; and by sub-section 2, that where such lands are not benefited to as great an extent by the expenditure of moneys for and on account of public improvements of the character mentioned in the sub-section as other lands in the municipality generally, the council of such town or village shall annually, at least two months before striking the rate of taxation for the year, pass a by-law declaring what part of the said lands so held and used as farm lands only, shall be exempt or partly exempt from taxation for the expenditure of the municipality incurred for waterworks, whether for domestic use or for fire protection or both, the making of sidewalks, the construction of sewers, or the lighting and watering of streets, regard being had in determining such exemption to any advantage, direct or

indirect, to such lands, arising from such improvements or any of them.

Judgment.
Ferguson, J.

Sub-section 3 provides that any person claiming such exemption in whole or in part shall notify the council of the municipality thereof within one month after the time fixed by law for the return of the assessment roll, and shall by some intelligible description indicate the land and quantity as nearly as may be in respect of which exemption is claimed.

And sub-section 4 provides that any person complaining that the by-law does not exempt, or sufficiently exempt, him or his said farm lands from taxation as aforesaid, may, within fourteen days after the passing thereof, notify the clerk of the municipality of his intention to appeal against the provisions of such by-law, or any of them, to the Judge of the County Court who shall have full power to alter or vary any or all of the provisions of the by-law, and determine the matter of complaint in accordance with the spirit and intent of the provisions of the section.

The notice given by the Giles's was under the provisions of sub-section 3, but containing in addition a threat in respect to a motion for a mandamus and a requirement of a copy of the by-law in time for an appeal therefrom.

Sub-section 2, as I think, contemplates and provides for the passing of such a by-law each year, so that a by-law of this character passed in any year would apply to an assessment or exemption for that year only.

The evidence shews, clearly, as I think, that the council of the municipality have not made any provision for using, have not used, and do not intend to use, any of the moneys raised, or to be raised, by way of assessment for taxes in the municipality for the year 1898 for expenditure incurred for improvements of the kind or character of those mentioned in sub-section 2 of this section 8.

There was, therefore, practically no need of passing a by-law of the character referred to, and the council did not pass one. There was only the bare provision of the

Judgment. statute that such a by-law should be passed, that is, if it
Ferguson, J. be assumed that there were lands not benefited as mentioned in sub-section 2.

There are certain improvements made, or being made, but this was done, or is being done, upon borrowed money which is to be repaid by the money arising upon the sale of debentures, the earliest of which falls due on the 1st day of December, 1899, and no part of the taxes levied in the municipality for the year 1898 has been used, or is to be used, in respect of these debentures or improvements.

The motion for the order appealed from was not made till the 11th day of October, 1898, long after, as I understand the evidence, the rate for the year 1898 had been struck, and in striking this rate nothing was included or contemplated in regard to any improvements of the kind mentioned in this sub-section 2, or the money, or raising the money, to pay for any such improvements.

In such circumstances I cannot perceive what advantage can arise to the applicant for the order by the passing of the by-law ordered to be passed, or how such a by-law could operate any benefit to any one.

In High on Extraordinary Legal Remedies, sec. 14, it is stated: "It is a fundamental principle of the law of mandamus that the writ will never be granted in cases where, if issued it would prove unavailing." Wherever it appears that the object sought is impossible of attainment, so that the granting of the writs must necessarily be fruitless, the Court will refuse to interfere. The relief will be withheld when, if granted, it would accomplish no useful purpose, even though it might do no harm. And the writ will not be granted when there is no necessity for the relief, and when it would be ineffectual to aid the parties aggrieved.

The Court will not grant a mandamus unless convinced that it will be practically effective to secure the object aimed at: *The Queen v. Sir Gilbert Heathcote* (1711), 10 Mod., at p. 55, referred to in Shortt's Informations, Mandamus & Prohibition, p. 246.

In *Ex p. Nash* (1850), 15 Q. B. 95, Lord Campbell said: Judgment.
 “We grant it (the writ) when that has not been done Ferguson, J.
 which a statute orders to be done, but not for the purpose
 of undoing what has been done.” This case is referred to
 in Shortt, p. 250, and the Court has always refused to allow
 an application for a mandamus to be made the occasion or
 excuse for obtaining the opinion of the Court on some
 doubtful question of law, or as to the construction of an
 Act of Parliament.

By sec. 58, sub-sec. 9 of the Judicature Act, it is provided that a mandamus may be granted in all cases in which it shall appear to the Court to be just or convenient that the order should be made. This, however, does not, as I think, conflict or interfere with the principle of the authorities above alluded to; and where a peremptory mandamus is granted, the decision is subject to review: *The Queen v. The Churchwardens of All Saints* (1876), 1 App. Cas. 611; *The Queen v. The Mayor, etc., of Bangor* (1886), 18 Q. B. D. 349, at p. 360.

For the reasons that I have endeavoured to give, and with deference and respect, I am of the opinion that the order appealed from should not have been made, and that it should now be reversed.

There were further contentions that the demand, or what was set up as the demand, was not sufficient and that the order made was too broad and comprehensive in its terms, but with these I do not think it necessary to deal, being of opinion, as above, that the other grounds are sufficient to shew that the order should be reversed, with costs of the appeal and the costs of the application for the order appealed from to be paid by the applicant, Thomas Giles, to the municipality.

ROSE, J.:—

The right of the applicants to the order made depends on their right to require the council to pass a by-law, whether any farm lands in the municipality were or were

Judgment. not benefited to as great an extent as other lands, within
Rose, J. the meaning of sub-sec. 2 of sec. 8, ch. 224, R. S. O.

If it was the duty of the council in either event to pass a by-law, then in case there were no farm lands not benefited, the by-law would declare that there were no lands exempt in whole or in part, and an appeal, it is contended, would then lie under sub-section 4. If there were farm lands not benefited, the by-law would declare what part should be exempt or partly exempt, and an appeal is in such a case expressly given under sub-section 4. In either event the form of the by-law would depend on the determination of the question whether there were any farm lands not benefited to as great an extent as other lands.

The notice or demand served in the case before us was that the council should pass a by-law declaring the lands in question exempt, and the order is to the like effect. Even if such a demand was not in any event too large, the order in my opinion goes beyond the proper exercise of the powers of the Court. The most that could properly have been ordered was the passing of a by-law declaring whether or not there were any farm lands which should be exempt in whole or in part. The order takes away from the council the powers and right to decide as a preliminary question whether there were any farm lands which were or were not benefited, and decides, by way practically of appeal, what is to be decided by the Judge of the County Court under sub-section 4, if any appeal is given under such sub-section. But if it is said that the neglect or refusal of the council to pass a by-law was a determination that the lands in question were benefited and that the Court has the power and the duty to determine the fact, and that the order in question was based upon a finding by the Court that the lands in question were not benefited, either to as great an extent as other lands or at all, then it seems to me that decision cannot be supported on the conflicting evidence, and that the question on such evidence should have been left to the decision of the council and not interfered with. Had the council refused to consider and determine, and the application had

been to compel it to do its duty, the case would have been quite different.

Judgment.

Rose, J.

But it also appears to me that the application should not have been made against the council of 1898, as the expense complained of was not to be met out of the taxes levied in that year, and so the council of 1898 was not called upon to pass any such by-law. The waterworks, so called, were paid for out of moneys in hand, part of the surplus from former years, and the other expenditure is to be provided for by the council of 1899, which must consider the rights and liabilities of the applicants in respect of their farm lands.

And finally it seems to me that the order should not have been granted because it could not have been enforced so as to work out the rights of the parties without doing more injury than any benefit gained.

The statute provides that the by-law should be passed at least two months before striking the rate of taxation for the year. This application was not made until after the 1st of October when the rolls were in the collector's hands, and seeing the smallness of the amounts which the claimants complain they improperly are or will be called upon to pay, say \$5 in one and \$6 in the other, I think, considering the lateness of the applications, they should not have been granted, even assuming, contrary to the fact, that the taxes to be levied in 1898 included such sums.

It is manifest that the order cannot now be enforced, the council of 1898 having gone out of existence, and the duty of the council of 1899 being with reference to the taxation for this year only. The question is now, apart from costs, a purely academic one.

On the whole, I think the appeal should be allowed, the order set aside and the application be dismissed. The appellant must have his costs here and below.

ROBERTSON, J. :—

I concur in the result come to by my brothers Ferguson and Rose, and do not think it necessary to particularize.

G. A. B.

SHEARD V. HORAN ET AL.

Damages—Warranty of Title—Sale of Machine—Contemplated Profits from Use of.

The defendant company in 1893 sold a hay press to their co-defendant upon credit, and upon the terms that the property should remain in them until payment. The contract was properly filed under sec. 6 of 51 Vict. ch. 19, now sec. 3 of R.S.O. ch. 149. A few months afterwards the purchaser resold the press to the plaintiff, who had no knowledge of the facts, and was told that it was paid for and free from any lien. The defendant company seized it in the plaintiff's possession under the terms of their contract :—

Held, that the plaintiff was entitled to recover from his vendor, upon a warranty of title which he proved, the value of the press and the sum he would have received beyond expenses upon contracts actually made to press hay with the press in question, and which he was in course of executing at the time of the seizure, the use of the press in that way having been in the contemplation of the plaintiff's vendor at the time of the sale.

Statement. ACTION tried before STREET, J., without a jury, at Barrie, on the 18th May, 1899. The facts are stated in the judgment.

Birnie, for the plaintiff.

Shepley, Q.C., for the defendants the A. R. Williams Co.

W. A. J. Bell, for the defendants Kelly and Horan.

May 25, 1899. STREET, J.:—

The defendants the A. R. Williams Company, on the 23rd October, 1893, made a conditional sale of a hay press to the defendant Horan; the sale was upon credit, and the terms of sale were that the property should remain in the vendors until payment of the purchase money. The contract was properly filed under the 6th section of 51 Vict. ch. 19, now consolidated as sec. 3 of ch. 149, R. S. O.

The purchaser Horan obtained the hay press under the contract, and resold it to the plaintiff on the 19th January, 1894, the plaintiff having no knowledge of the facts, and being told that it was paid for and free from any lien. The plaintiff used it for nearly four years, the defendant

Horan paying from time to time small sums on account of the purchase money. In January, 1898, however, the balance of the purchase money being unpaid and long overdue, the Williams Company found that Horan was no longer in possession of the hay press, and following it up they seized it in the plaintiff's possession under the terms of the contract. Thereupon this action was brought by the plaintiff against his vendor Horan, the original vendors the A. R. Williams Company, and Messrs. P. D. Kelly & Son, who, however, were not shewn to have had any concern in the matter. The plaintiff alleged an express warranty of title by Horan. Horan denied this warranty, and set up that, if the A. R. Williams Company had a lien, the plaintiff knew of it when he purchased.

Judgment.
Street, J.

The A. R. Williams Company justified their seizure by setting up the terms of their contract with Horan and his default in payment of his purchase money. The due filing of their lien was admitted, and it was proved that the purchase money was in arrear.

I could see no ground upon which the plaintiff could recover against either the A. R. Williams Company or Messrs. P. D. Kelly & Co., and dismissed the action as against both of them with costs at the conclusion of the evidence, reserving only the question as to what the plaintiff should recover against Horan.

The warranty of title by him was clearly proved, and the plaintiff is entitled to recover from him the value of the hay press, which I fixed at \$150. I think also that it is proper to allow him the sum he would have received beyond expenses upon contracts actually made to press hay with the press in question and which he was in course of executing at the time of the seizure; this sum I fix at \$100. It was in the contemplation of Horan when he sold the press to the plaintiff that it was to be used for the purpose of pressing the hay of different farmers by the plaintiff for profit, and that arrangements would be made with them in advance, and the seizure by the owners of the machine would naturally deprive the plaintiff of the

Judgment. means of completing his contracts and cause him the loss
 Street, J. of the profits of the contracts in force at the time of the seizure, and these damages appear therefore to be recoverable: *The Argentino* (1889), 14 App. Cas. 519; *Cory v. Thames Ironworks Co.* (1868), L. R. 3 Q. B. 181; *Mullett v. Mason* (1866), L. R. 1 C. P. 559.

I do not think the plaintiff should recover the costs of his unsuccessful action against the A. R. Williams Company for the seizure. The grounds upon which it was sought to sustain that action appear to me to be untenable and such as could not reasonably be expected to prevail.

The plaintiff will therefore have judgment for \$250 against Horan, and the action will be dismissed with costs as against the other defendants.

E. B. B.

[DIVISIONAL COURT.]

RANDALL V. ATKINSON.

Evidence—Death of Witness before Cross-examination—Admissibility—Stenographic Taking—Effect of.

Judgment of ROSE, J., *ante* p. 242, affirmed.

Statement. THIS was an appeal from the judgment of ROSE, J., reported *ante* p. 242, which was argued on May 2, 1899, before a Divisional Court composed of BOYD, C., FERGUSON, and ROBERTSON, JJ.

W. M. Douglas, for the appeal, contended that the case was distinguishable from the cases relied upon in the judgment appealed from, inasmuch as the examination in chief, itself, of the defendant, was not completed before he died.

Wallace Nesbitt, contra.

May 3, 1899. BOYD, C.:—

Judgment.

Boyd, C.

Every aspect of this appeal is directly covered by the judgment of my brother Rose, except perhaps one point urged by the appellants: that is, the examination in chief of the defendant as a witness on his own behalf had not been concluded before his death, and therefore, it is contended, because it was thus incomplete it is not in any way admissible as evidence.

True there are some old cases which are quoted in the books as laying down the rule that if the depositions are incomplete they will not be receivable. But the explanation lies in the old manner of taking evidence. The witness's answers were taken down in writing, then read over to him, at which time he might correct or explain, and then he was to sign the examination in chief before the cross-examination was proceeded with. Of old the deposition was not evidence till it was signed, and if the matter had all been written out but was not signed, it was still incomplete, and could not be looked at as evidentiary.

But this method does not obtain in the modern system of stenographic examination. Now the spoken word of the witness becomes the written word of the record, and all is complete as it progresses. Nothing is needed to authenticate it so far as the witness is concerned. At every stage of progress it is evidence as far as it goes, and the old cases, such as *Copeland v. Stanton* (1718), 1 P. Wms. 414, and *Nolan v. Shannon* (1828), 1 Molloy 157, have now no pertinence. This evidence is certified by the stenographer, and so is complete at the end as far as it goes.

The cases have been pretty thoroughly discussed by Mr. Justice Rose, in whose conclusion we agree.

There are two omissions which may be supplied. The eldest case, 10 Car. 2, *Arundel v. Arundel*, is thus reported: a witness examined for the plaintiff and to be cross-examined for the defendant, but before he could be cross-examined died, yet this Court (Ch.) ordered his depositions to stand: 1 Rep. in Ch. 90.

Judgment.

Boyd, C.

This case is followed in a considered decision of a very eminent Judge, Sir John Nicholl, in *Hill v. Bulkeley* (1811), 1 Phillim. 280, where the witness being dead before being cross-examined, it was held that though the examination was not complete, the Court, under the circumstances, might receive something short of the regular examination * * though at the hearing it must be read with some deductions, because it was possible the cross-examination might have discredited the witness.

It is perhaps well to emphasize the fragmentary character of the incomplete examination, so that it may not be used for more than it is worth—always keeping in view Lord Cranworth's words, "There having been no opportunity for the cross-examination of the deponent, I shall have no scruple in giving less credit to the affidavit in question than to any evidence which may be adduced by the other side to rebut it": *Morley v. Morley* (1855), 5 D. M. & G. 615.

The judgment should be affirmed with costs.

FERGUSON and ROBERTSON, JJ., concurred.

G. A. B.

[DIVISIONAL COURT.]

REGINA V. APPLEBE.

*Municipal Corporations—By-law—Invalidity of—“Transient Traders”
—Occupation of Premises—Quashing Conviction.*

A by-law of a city provided that “No person not entered upon the assessment roll * * or who may be entered for the first time in the said assessment roll * * and who at the time of commencing business * * has not resided continuously in said city * * at least three months shall commence business * * for the sale of goods or merchandise * * until such person has paid * * the sum of * * by way of license” :—

Held, that the statute under which the by-law was framed, R. S. O. ch. 223, sec. 583, sub-secs. 30 and 31, relates to transient traders *who occupy premises* in a municipality, and that clause (b) of sub-sec. 31 defining the term “transient traders” does not modify the provision as to occupation, and that the by-law was defective and invalid in being directed merely against persons not entered upon the assessment roll and who had resided continuously for three months in the municipality, and was silent as to these persons being in occupation of premises.
Conviction quashed.

THIS was an application to quash a conviction by the Statement.
police magistrate of the city of Windsor, of one Joseph Applebe, under a by-law respecting transient traders, worded as follows :

BY-LAW No. 956.

A By-law Respecting Transient Traders.

Passed February 14, 1898.

Whereas it is deemed expedient and necessary to make provision for the licensing of transient traders in the city of Windsor :

Therefore the corporation of the city of Windsor by the council thereof enacts as follows :—

I. No person not entered upon the assessment roll of the city of Windsor or who may be entered for the first time in the said assessment roll, in respect of income or personal property, and who at the time of commencing business as hereinafter mentioned has not resided continuously in said city for a period of at least three months, shall commence business in said city for the sale of goods

Statement. or merchandise of any description by auction or any other manner by a licensed auctioneer, agent or otherwise, until such person has paid into the hands of the treasurer of said city the sum of two hundred dollars by way of license; which said sum so paid as license shall by said treasurer be credited to the person paying the same upon and on account of taxes for the unexpired portion of the then current year as well as any subsequent taxes in the event of such person remaining in said city a sufficient time for taxes to become due and payable by such person, and in any other event to be taken and used by said city as a portion of the license fund of the municipality.

II. Any person guilty of an infraction of any of the provisions of this by-law, shall upon conviction thereof forfeit and pay at the discretion of the convicting magistrate, a penalty not less than twenty-five dollars nor more than fifty dollars for each offence, exclusive of costs, and in default of the payment of said penalty and costs forthwith, the same may be levied by distress and sale of the goods and chattels of the offender; and in case of there being no distress found out of which said penalty and costs can be levied, the convicting magistrate may commit the offender to the common gaol of the county of Essex with or without hard labour, for a period not less than twenty days nor more than three calendar months, unless the said penalty and costs be sooner paid.

III. That by-law numbered 305 entitled "A by-law to provide for the licensing of transient traders and for other purposes therein mentioned," passed 19th November, 1877, and all other by-laws and parts of by-laws inconsistent with this by-law shall be and the same are hereby repealed.

IV. That this by-law shall come into force and take effect on and from the 14th day of February, 1898.

The conviction was as follows:—

"That * * Joseph Applebe is convicted before the undersigned police magistrate * * for that he, the said Joseph Applebe, * * not being a person entered upon

the assessment roll of the city of Windsor, in respect of income or personal property, nor resident in the city of Windsor for a period of three months, did occupy premises and commence business for the sale of goods * * and did offer for sale and sell goods * * the said goods not being the stock of an insolvent estate, without first paying * * the sum of * * by way of license, contrary to a certain by-law * * passed on the fourteenth day of February, A.D. 1898, and intituled a by-law respecting transient traders, and I adjudge the said Joseph Applebe for his said offence to forfeit and pay, etc., etc." Statement.

The motion was argued on May 1st, 1899, before a Divisional Court composed of BOYD, C., FERGUSON, and ROBERTSON, JJ.

Aylesworth, Q.C., for the motion. The by-law was passed under the provisions of R. S. O. ch. 223, sec. 583, sub-secs. 30, 31, 32 and 33, and is bad. It does not follow the statute, and is too wide, as it seeks to apply to any person not on the assessment roll: *McLean and The Corporation of the Town of St. Catherines* (1868), 27 U. C. R. 603; *Regina v. Jim Sing* (1895), 4 B. C. R. 338. There was no necessity for the defendant to take out any license. It was an insolvent estate (which is excepted in the statute) he was selling, on which taxes had been paid when in the hands of the insolvent. The law is not aimed at such cases as this, but at transient traders seeking to escape taxation. I refer also to *Regina v. Caton* (1888), 16 O. R. 11. The applicant should get costs: *Regina v. Jamieson* (1884), 7 O. R. 149; *Regina v. Hollister* (1885), 8 O. R. 750; *Regina v. Stewart* (1888), 17 O. R. 4.

W. M. Douglas, contra. The conviction is legal on its face, and the by-law is valid: sub-sec. 31, clause (b) of R. S. O. ch. 223, sec. 583, defines transient traders. The by-law is headed a by-law respecting transient traders. The defendant is referred to in the conviction as such, and is so described, to shew that he is a transient trader. It is not

Argument. necessary in the by-law to except insolvent estates : *Cathcart v. Hardy* (1814), 2 M. & S. 534 ; *Spieries v. Parker* (1786), 1 T. R., at p. 144. The evidence shews the defendant was selling new goods mixed with the goods of the insolvent estate.

Aylesworth, in reply. There was no finding that the defendant's occupation of the premises was temporary, and that is necessary to shew him to be a transient trader. The statute relates to all transient traders, while the by-law relates only to the class of transient traders therein described.

May 2, 1899. BOYD, C. :—

This by-law is open to the objection which was discussed in *Regina v. Cuthbert* (1880), 45 U. C. R., at p. 24. The statute then in force was for licensing, etc., transient traders and other persons who occupy premises in the city, etc.

Osler, J., said : "The first requisite to jurisdiction over any transient trader, * * in respect of any breach of such a by-law is, that he shall be an occupant of premises in the municipality. If he does not occupy premises he does not come within the section."

So in *Regina v. Caton* (1888), 16 O. R., at p. 13, Armour, C. J., says : "The words of the statute 'who occupy premises,' clearly apply to the words 'transient traders,' as well as to the words 'and other persons.'"

Now, in the present statute R.S.O. ch. 223, sec. 583, subsecs. 30 and 31, the enactment relates to transient traders who occupy premises in a municipality—while clause (b) of sub-sec. 31 defines or explains the term "transient traders," and does not modify the provision as to the occupation of premises.

This by-law is defective and invalid because it is directed merely against persons not entered upon the assessment roll, who have not resided continuously for three months in the municipality, and is quite silent as to these persons being in the occupation of premises.

The element of "occupation" appears to be one main ground of distinction between the transient trader and the pedlar or hawker of wares according to the scheme of our Municipal Act. Judgment.
Boyd, C.

The by-law as framed is therefore in excess of the power given by the "transient traders' clauses" of the statute, and falls to the ground as *ultra vires*.

This involves also the quashing of the conviction, but I am not disposed to give costs; for, upon the proved manner of trading, there was an infraction of municipal policy.

FERGUSON and ROBERTSON, JJ., concurred.

G. A. B.

[DIVISIONAL COURT.]

McMILLAN V. McMILLAN ET AL.

Will—Repugnant Clauses—Construction.

A testator by the third clause of his will devised a lot of land to a son in fee simple, and by the fourth clause it was provided (as happened) that if his said son should leave no lawful heir or children the plaintiff, another son, should have the lot in fee simple.

By the fifth clause he gave his wife the use of half the lot during her life, and after her death such half of the lot was to belong to his son firstly above mentioned, in fee simple :—

Held, that the fourth and fifth clauses were irreconcilable; nor could they be transposed so as to reduce the fee simple in the third clause to an estate for life should the devisee therein die without issue, with remainder to the plaintiff: that the devise in the third clause was by the fourth clause cut down to an estate tail with a remainder in fee to the plaintiff, and that the fifth clause gave a life estate in the half of the lot to the testator's widow with a remainder in fee to the son firstly mentioned.

Judgment of ROBERTSON, J., varied.

THIS was an appeal from a judgment of ROBERTSON, J., Statement. in an action brought by Duncan D. McMillan to recover possession of certain land from the defendant Margery McMillan under the circumstances set out in the judgment, and which was tried at Cornwall on the 28th and 29th November, 1898.

Argument.

R. Smith, and *G. H. Pettit*, for the plaintiff.

D. B. Macleennan, Q. C., and *J. W. Liddell*, for the defendant Margery McMillan.

No one appeared for the defendant George McMillan.

December 23, 1898. ROBERTSON, J. :—

The plaintiff is a son of the testator, and is the son Duncan D. McMillan mentioned in the said will. The defendant Margery is the widow of the late Angus McMillan, also a son of the testator, and mentioned in said will. The defendant George McMillan is the grandson of the testator, and is also referred to in the said will.

After making provision for the payment of debts by his executors, the will proceeds as follows :—

“ Thirdly.—I give and devise to my son Angus McMillan and his heirs and assigns forever all that parcel or tract of land and premises situate lying and being in the township of Finch, county of Stormont aforesaid, being composed of the south half of lot number twenty-three, third concession of Finch, county aforesaid.

“ Fourthly.—It is my will and desire, provided my son Angus McMillan shall have no lawful heir or children, that the above mentioned tract of land, being the south half of lot number twenty-three in the third of Finch, after his death, that my son Duncan D. McMillan shall have it with all the right and title that my son Angus McMillan had to it heretofore ; provided that my son Duncan D. McMillan will come and take possession of the same six months after my son Angus McMillan’s death : but if my son Duncan does not come and take possession of the same, it is my will that it will descend to my grandson, George McMillan, his heirs and assigns forever.

“ Fifthly.—I will and bequeath to my beloved wife the use of all my stock of cattle and personal property. It is my will likewise, that she will have the use of the east half of the south half of lot number twenty-three, third concession of Finch, county Stormont, during life, to re-

main on the premises on which she will be entitled to Judgment. reside during her life. After her decease my will is that Robertson, J. the same shall belong to my son Angus McMillan, his heirs and assigns forever.

"Sixthly.—I will and desire that my said son Angus McMillan shall maintain and support his unmarried sister till she is married or otherwise provided for; my said unmarried daughter contributing by her own labour for her support: and in case of the marriage of my daughter, that she shall have two cows and one heifer, and also bed and bedding, the same to be given when convenient.

"Seventhly.—I will and bequeath to my dear sister, who is in the ninety-fifth year of her age, the use of the room in which she now resides, during her life, with comfortable bed and bedding and all other necessities: it is my will also that my said son Angus McMillan will maintain and support her during life, and after her death that he will give her a decent funeral."

On the death of the testator, the son Angus took possession of the land, his mother, the widow, enjoying the east half thereof, on which the house, etc., were situated, during her life; she having predeceased Angus, who died on 25th December, 1897, leaving his widow, the defendant Margery, him surviving, without ever having had any children, having first made his last will, dated 11th November, 1897, by which he devised and bequeathed to his wife all the real and personal property which he might die possessed of, and particularly the lands in question.

The sister of the first testator, Duncan B., referred to as being in her ninety-fifth year, is dead.

The plaintiff, within the six months after the death of Angus, came to the place and demanded possession of the defendant Margery, who was in possession, claiming title under the will of her late husband Angus, and which possession she refused to give up.

The case was very fully and ably argued before me by the respective counsel engaged, after which I reserved judgment.

Judgment. After the best consideration that I am able to give the case, I am of opinion that the testator intended to devise to his son Angus the fee simple in the land: subject; first, to the life estate in the east half thereof to his widow, and subject to be reduced to a life estate should he die without having a child or children: and in order to render every part of the will effective, which is the rule, if it possibly can be done, the local order of the limitations must be disregarded: and the transposition of clauses four and five will effect this, so that, taking the third clause first, we have a devise of the whole to Angus in fee, subject to the life estate in the east half to the widow, created by the fifth clause. Then the fourth clause comes in to reduce the fee simple to an estate for life in Angus, should he die without having children, with remainder in fee to the son Duncan. That is, to my mind, clearly made manifest by the will.

It is laid down by Anderson, C.J., in *Cro. Eliz.* (1583), at p. 9, Anonymous, "That if one devise land to J. S. in fee, and after by the same will devise that land to J. D. for life, both parts of the will shall stand."

That is still the rule, and in *Brocklebank v. Johnson* (1855), 20 Beav., at p. 212, Sir John Romilly, M. R., says: "It is urged, that if two passages in a will are inconsistent, the latter is to prevail. This, no doubt, is true where two passages are directly opposed to each other; but where this is not so, and there is a mere inconsistency, it is the duty of the Court to endeavour to discover, from the whole will, the real meaning of the testator, and, if possible, to reconcile all its parts."

The same view is expressed by Sir John Leach, M. R., in *Sherratt v. Bentley* (1833), 2 My. & K., at p. 157.

On the argument, it was contended by counsel for defendant that clause five was so inconsistent with clause three that the two could not be reconciled, and that, at all events, the east half of the land went to Angus in fee in remainder after the life estate of his mother, and I was inclined to that way of thinking; but, after due consideration, I have

come to the conclusion that that is not the case under this will.

Judgment.

Robertson, J.

The two clauses are, apparently, inconsistent, but they are reconcilable, and that being the case, I am of opinion that my duty is to reconcile them as I have done.

It was also contended before me for plaintiff that the estate created in Angus was an estate tail. I cannot agree to that, but it makes no difference in the result, so far as the plaintiff is concerned, as in the view I take he is entitled to recover on the other grounds.

I therefore order judgment to be entered declaring that the plaintiff is entitled to the land in fee simple in remainder, his brother Angus having died without having had children, and that the devise by Angus to his widow, the defendant Margery, is of no effect.

Under the circumstances there should be no costs.

I have also referred to the following cases: *King v. Evans* (1895), 24 S. C. R. 356; and the cases cited in *Jarman on Wills*, 5th ed., at p. 1175, also at pp. 438, 439, 442, 443; *Boys' Home of the City of Hamilton v. Lewis* (1883), 4 O. R. 18; *Jardine v. Wilson* (1872), 32 U. C. R. 498; *Tyrwhitt v. Dewson* (1880), 28 Gr. 112.

From this judgment the defendant Margery McMillan appealed, and the appeal was argued on March 9, 1899, before a Divisional Court composed of ARMOUR, C.J., FALCONBRIDGE, and STREET, JJ.

D. B. Maclellan, Q.C., for the appeal. Margery McMillan is entitled under the will of Angus, who acquired his title under the will of Duncan B. The latter will is the one in question in this action. The third clause of Duncan B. McMillan's will is plain, and Angus takes under it an estate in fee simple. It is true there is an apparent attempt in clause four to cut that estate down, but in clause five the testator reverts to his original intention, and after giving the widow an estate for life gives Angus the fee simple. Where an estate is clearly given it must stand unless plainly and unequivocally cut down: *Jarman*

Argument. on Wills, 5th ed., 443. The words "heir" and "children" being singular for "heir" and plural for "children" were intended to designate different persons in clause four, and the testator could not exclude him when he devised to Duncan, who was himself an heir. There is no authority for transposing any of the clauses in the will as the trial Judge did: Jarman on Wills, 5th ed., 439, 465. Clauses six and seven of the will providing as they do for the support and maintenance of the testator's daughter and his aged sister by Angus, and not by Duncan, further indicates the testator's intention to give the land absolutely to Angus and the abandonment of the testator's idea of giving it to Duncan. I refer also to Jarman, 436.

R. Smith, contra. The combined effect of clauses three and four is to give Angus an estate tail: Jarman on Wills, 5th ed., 1175. The word "heir" includes "children." If children were intended, then children must be read throughout the will, and so doing would, under clause three, make Angus' estate an estate tail: *Wild's case* (1599), 6 Rep. 16b. If children were not intended, then the authorities are all in a line for an estate tail: *O'Reilly v. Corrie* (1854), 11 U. C. R. 557; *Dale v. McGuinn* (1868), 15 Gr. 101; *Jardine v. Wilson* (1872), 32 U. C. R. 498; *Tyrwhitt v. Dewson* (1880), 28 Gr. 112. The meaning of the words of limitation used in the third clause having been explained by the fourth clause in the will, that meaning should attach to the same words of the limitation all through the will: *Boys' Home of the City of Hamilton v. Lewis* (1883), 4 O. R. 18, at p. 24; *Evans v. King* (1894), 21 A. R. 519, *per* BURTON, J.A., at p. 531. An effort should be made to reconcile the whole will. If clause five overrides clause four as to half of the land it entirely cuts out the estate given. By clauses three and five there is a devise of the whole farm. The local order of the limitation should be disregarded, if possible by transposition to deduce a consistent disposition from the entire will: Jarman on Wills, 5th ed., 439; *Brocklebank v. Johnson* (1855), 20 Beav. 205; *Blamire v. Geldart* (1809), 16 Ves. 314.

MacLennan, in reply.

May 1, 1899. The judgment of the Court was delivered Judgment.
by Armour, C.J.

ARMOUR, C. J.:—

The rules of construction applicable to wills are that technical words are *primâ facie* to be understood in their strict technical sense; that the will is, if possible, to receive a construction which will give to every expression in it some effect so that none may be rejected; that all the parts of the will are to be construed so as to form a consistent whole; that of two modes of construction, that is to be pursued which would prevent an intestacy; and that where two provisions of a will are totally irreconcilable, so that they cannot possibly stand together, and there is nothing in the context or general scope of the will which leads to a different conclusion, the last shall be considered as indicating a subsequent intention and shall prevail.

Applying these rules to the will in question the construction to be placed upon it appears reasonably clear.

The clauses of the will raising the questions to be determined in this case are as follows:—

[The learned Judge then set out the clauses in the will referred to in the judgment of Robertson, J.]

Angus McMillan by force of the devise contained in the third clause of the will became entitled to the land in question in fee simple.

But by force of the fourth clause of the will his estate in fee simple was cut down to an estate in fee tail, for the words "lawful heir" in that clause are to be construed as lawful heir of the body.

"When real estate is devised over in default of heirs of the first devisee, and the ulterior devisee stands related to the prior devisee so as to be in the course of descent from him, whether in the lineal or collateral line and however remote, as the prior devisee in that case could not die without heirs while the devisee over exists, the word 'heirs' is construed to mean heirs of the body, and accord-

Judgment. ingly the estate of the first devisee, by the effect of the
Armour, C.J. devise over, is restricted to an estate tail, and the estate
of the devisee over becomes a remainder expectant on
that estate": Jarman on Wills, 5th ed., 1175.

And Angus McMillan, having died without having any
lawful heir of his body or children, the plaintiff became
by force of the fourth clause of the will entitled to the
land in question. But by the fifth clause of the will the
east half of the land in question is devised to Angus Mc-
Millan in fee, subject to the life estate of his mother
therein.

It was contended that the fourth clause of the will
should be rejected as repugnant, having regard to the resi-
due of the will, but for this I know of no warrant or
authority.

The learned trial Judge got rid of the difficulty by
transposing the fifth clause of the will and giving it a
place in the will prior to the fourth clause, but no author-
ity was cited for such a transposition nor have I been able
to find any, and such authority as I have been able to find
on the subject appears to me to be against it.

In the *Duke of Marlborough v. Lord Godolphin* (1750), 2
Ves. 61, at p. 74, Lord Chancellor Hardwicke said: It is true,
a court of law as well as of equity (and a court of equity
has no greater latitude in construction of wills, and trans-
posing the words thereof, than a court of law has) will,
to make sense of a will otherwise insensible, and to
make it take some effect rather than be totally void, often
transpose words to attain the intent that on the face of
the will the testator had; which was *Luxford's* case, 3
Lev., where the court did not make the transposition to
let in more, or defeat the devisees (which in no case do I
know, that the courts have done) but it was to make the
limitation sensible, the words being insensible, and to
attain the meaning: but in no case, where the words are
plain and sensible, is a transposition made in order to
create a different meaning and construction; much less to
let in different devisees and legatees in a will; which is a

very different thing from the case, where the persons to ^{Judgment.} take are certain, and the question is only concerning the ^{Armour, C.J} construction of the words to create the limitation or interest to be taken."

The fourth and fifth clauses of the will cannot in my opinion be reconciled without making a new will for the testator, and they cannot possibly stand together, the fifth clause must therefore be considered as indicating a subsequent intention on the part of the testator, and must prevail.

The result is that the plaintiff is entitled to judgment for the west half of the land in question, and the defendant is entitled to judgment for the east half of it.

And as each has succeeded in an equal degree there will be no costs to either party of the action or of this motion.

G. A. B.

FLOER V. THE MICHIGAN CENTRAL RAILWAY COMPANY.

Trial—Jury—Failure to Agree—Rule 780—Right of Judge to Dismiss Action.

Rule 780 which provides that "if the jury disagree and find no verdict, the Judge at, or after the trial may, notwithstanding, dismiss the action" does not empower the Judge in every case of disagreement to determine the action himself; it is confined to the case where he is of the opinion that he should have withdrawn it from the jury.

THIS was an action tried before STREET, J., at the Sandwich Spring Assizes, with a jury, on 21st March, 1899, and was brought by the plaintiff, a widow, to recover damages under Lord Campbell's Act for the death of her husband, who had been killed by a train of the defendants at a crossing near the city of Windsor. Statement.

The negligence relied upon at the trial was the omission to give the full statutory notices of the approach of the train by sounding the whistle or ringing the bell.

Counsel for the defendants moved for a nonsuit both at the close of the plaintiff's case and when all the evidence for both sides was in.

Statement. The learned Judge, being of opinion that there was some evidence to submit to the jury, although it was not of a satisfactory character, overruled the motion for a nonsuit.

The jury were locked up for some hours and, being unable to agree, were discharged.

An application was thereupon made by the defendants' counsel under Rule 780, asking the learned Judge to enter judgment in favour of the defendants; and, notice having been given, the motion came on for argument on 21st April, 1899.

D. W. Saunders, for the defendants.

F. A. Anglin, for the plaintiff.

The following cases were referred to: *Peters v. Perry* (1894), 10 Times L. R. 366; *Casey v. Canadian Pacific R. W. Co.* (1888), 15 O. R. 574; *Bank of British North America v. Eddy*, Patterson, J.A., Nov., 1883 (a).

April 21, 1899. STREET, J.:—

I do not find anything in any of the cases referred to affording a definition of the limits of Rule 780.

I am willing to assume for the purposes of this motion that if I had been trying the present case without a jury, I should upon the evidence given at the trial have dismissed the action. But I do not think the rule is intended to give power to the Judge in every case in which a jury have failed to agree, to determine it himself. If that had been the intention we should have found a power given him of deciding it in favour of either the plaintiff or the defendant, whereas the power given is only to dismiss the action.

I think for this reason that the operation of the rule cannot have been intended to include every case coming within its full literal construction. A line must therefore

(a) Not reported.

be drawn within which its meaning should be confined, and I am unable to extend it beyond the case in which, after a trial by a jury and a disagreement, the Judge is of opinion that he should have withdrawn the issue from the jury instead of having submitted it to them.

The motion should be dismissed with costs to the plaintiff in any event.

G. F. H.

Judgment.

Street, J.

IN RE DYER V. EVANS.

Division Courts—Jurisdiction of—Prohibition.

After the recovery of judgment in a Division Court against the primary debtor and garnishee, but before the payment of the amount recovered, the debtor made an assignment for the benefit of creditors under R. S. O. ch. 147, whereupon an application was made by the garnishee to the Division Court Judge for an order under sec. 200 of R. S. O. ch. 60, discharging the debt from the attachment, which was refused:—

Held, that the matter being one within the jurisdiction of the Judge prohibition would not lie.

THIS was a motion on behalf of the judgment debtor Evans for an order for prohibition to the Judge and clerk of the 7th Division Court of the county of Middlesex, and to the primary creditor and the garnishee, to prevent the enforcement of a judgment obtained by the creditor against the garnishee in the said Division Court for the payment of \$53 out of a debt of \$105 due by the garnishee to the debtor Evans.

Statement.

The application was made upon notice to the other parties, and was based upon the fact that after the judgment recovered by the creditor against the garnishee, but before payment of the amount recovered, the debtor made an assignment for the benefit of his creditors to one Nugent, which, it was contended, had the effect of superseding the judgment recovered by the creditor against the garnishee, by virtue of the 11th section of R. S. O. ch. 147.

The assignee Nugent made an application to the Judge in the Division Court matter under sec. 200 of the Division

Statement. Courts Act, R. S. O. ch. 60, for an order discharging the debt due from the garnishee to the debtor from the claim of the creditor under the judgment recovered by him against the debtor, upon the ground that it had been superseded by the making of the assignment, but the application was refused.

J. S. Robertson, for the primary debtor.

Talbot Macbeth, for the primary creditor.

C. G. Jarvis, for the garnishee.

April 5, 1899. STREET, J. :—

The learned Judge of the County Court, against whom this prohibition is sought, clearly had jurisdiction to determine, under sec. 200 of the Division Courts Act, whether the assignee was entitled to set aside the judgment recovered by the creditor against the garnishee, under sec. 189.

The present application, though made in the name of the debtor, is in fact a mere appeal from the decision of the Judge in the Division Court matter. It is no ground for prohibition that the Judge of the Court below has come to a wrong conclusion upon a matter of law which he had jurisdiction to determine. Whether or not his conclusion was right or wrong is not the question here. The sole question is whether he had jurisdiction to consider it. I think he undoubtedly had, and the motion must therefore be dismissed with costs.

G. F. H.

RE CHEESBOROUGH.

*Insurance—Life Insurance—"Preferred Beneficiaries"—R. S. O. ch. 203
—Will—General Devise—Apportionment—After Acquired Policy.*

A devise by a testator of all his life insurance policies in favour of "preferred beneficiaries" as defined by the Ontario Insurance Act, R. S. O. ch. 203, is sufficient under section 160 of the Act to vary a policy or declaration or apportionment previously made without specifically identifying the policies by number, name, date, or amount insured.

Such a devise does not affect a policy issued after the date of the will.

Re Lynn (1891), 20 O. R. 475, and *McKibbin v. Feegan* (1893), 21 A. R. 87, commented on.

THIS was an application by the Scottish and Ontario Land Company, who were creditors of Alfred Holmes Cheesborough, deceased, for an order, under Rules 938 to 943, empowering the Toronto General Trusts Company, executors of said deceased, to pay out of the life insurance moneys which had come to their hands as executors, the claim of the company and of the other creditors of the estate. Statement.

The deceased in his lifetime was indebted to the applicants on a covenant in a mortgage made to them for the sum of \$2,000, and interest.

The deceased had effected the following insurances on his life:—On the 7th August, 1883, an insurance for \$2,500, in the North American Life Insurance Company, the amount being made payable "to the said Alfred Holmes Cheesborough, his executors, administrators or assigns." On the 25th October, 1892, an insurance in the Confederation Life Association for \$3,000, the amount being made payable "to his executors, administrators or assigns." In March, 1893, an insurance in the Supreme Council Royal Arcanum for \$3,000, the insurance moneys being made payable to his wife. On the second January, 1894, an insurance in the Sun Life Insurance Co. of Canada for the sum of \$1,500, the amount being made payable to "the insured's legal representatives."

In December, 1894, the certificate in the Royal Arcanum

Statement. was cancelled and a new one issued for the same sum of \$3,000 payable to the Toronto General Trusts Company of Toronto in trust for the surviving children of the insured.

On the 20th November, 1895, he effected a further insurance on his life in the Sun Life Insurance Company for the sum of \$1,000, the amount being made payable "to the insured's son Ernest Alfred Cheesborough should he survive him, otherwise to the insured's legal representatives."

On the 13th November, 1896, by a benefit certificate in the Independent Order of Foresters the deceased further insured his life for \$1,000, the amount being made payable to his wife or other beneficiary or trustee duly designated by him or in default of such designation to himself. On the back of the certificate was an endorsement making the amount payable to himself.

On the 28th November, 1894, the deceased duly made and executed his last will and testament, the material portion of which is set out in the judgment.

The testator died on the 3rd of May, 1897, leaving two children under age. His wife died a short time before the making of the will.

The question raised was as to the right of the Scottish Ontario and Manitoba Land Company to recover the amount of their claim against the estate out of the said insurance moneys, which were also claimed on behalf of the infants.

Langton, Q.C., for the Scottish Ontario Company.

A. Hoskin, Q.C., for the executors, the Toronto General Trusts Company.

A. J. Boyd, for the infants.

December 16th, 1897. FERGUSON, J.:—

The testator had five policies of insurance on his life. In respect of two of these, beneficiaries were named in accordance with the statute and law upon the subject, and as to these two no question arises here.

In respect to three of the policies no beneficiaries were, Judgment. before the making of the will, designated or in any way Ferguson, J. named. The amount of these three policies is \$7,000, or thereabouts.

The question now is between the executors and the children of the testator. The executors say that this insurance money, or the greater part of it, is required for the payment of the debts of the testator.

The will, after making specific provisions respecting a portion of his estate, namely, household furniture, jewellery, plate, etc., proceeds: "And subject thereto, I give, devise and bequeath all my property, real and personal, and including life insurance policies and certificates, to my executors and trustees upon trust, to pay the income arising therefrom for the care, education and maintenance of my children until they attain the age of twenty-one years or marry, whichever event first occurs, and with full liberty, power and authority to them, upon the request of the guardian or guardians of my children as herein provided, to pay and apply for each child out of the share of such child a portion or portions from time to time of the principal of my said estate, for the purpose of advancing such child in life or starting him or her in business * *. And when my child or children shall respectively attain the age of twenty-one years, the share or shares or remainder of such child's or children's shares shall be paid over to them respectively."

This is the only clause or part of the will that, as I think, is material here.

The Act 60 Vict. ch. 36, sec. 160 (O.)* is expressly made

* This section (now R. S. O. ch. 203, sec. 160) enacts that "the assured may by an instrument in writing attached to or endorsed on or identifying the policy by its name, number or otherwise, vary a policy or declaration or apportionment previously made, so as to restrict or extend, transfer or limit the benefits of the policy to the wife alone or to the children, or to one or more of them, or to the mother, * * and may from time to time, by instrument in writing attached to or endorsed on the policy or referring to the same, alter the apportionment as he deems proper; he may also, by his will make or alter the apportionment of the assurance

Judgment. retroactive, applying not only to any then future contract of insurance and to any declaration made on or relating to any such contract, but also to any contract theretofore issued and declaration theretofore made.

This section 160 expressly empowers the assured by his will to make or alter an apportionment of the insurance money.

As it appears to me, the effect is that it must now be considered that this testator had power to make an apportionment of these insurance moneys amongst his children, etc.: and that the question is whether or not he did so by this will.

It appears that whether an apportionment is made by an instrument in writing attached to or endorsed on or identifying the policy, or by will, the policy or policies must be identified "by number or otherwise."

In the case *Re Lynn* (1891), 20 O. R. 475, the testator had devised by a will dated the 3rd of June, 1890, all his real and personal estate, including his insurance in the "North-western Masonic Aid Association," to his executors, for the benefit of his wife and children, and died the 7th of July, 1890.

At that period the assured might, by any writing identifying the policy by its number or otherwise, make a declaration that the policy was for the benefit of his wife, or of his wife and children or any of them, etc., and the decision was that the will of the assured, as framed, satisfied the requirements. It by name identified the particular insurance, it was in writing, and was declaratory of the benefits, etc.

Re Lynn (1891), 20 O. R. 475, is approved of by the Court of Appeal in the case *McKibbon v. Feegan* (1893), 21 A. R. 87.

money; and an apportionment made or altered by his will, shall prevail over any other made before the date of the will, * * and whatever the insured may, under this section, do by an instrument in writing attached to or indorsed on or identifying the policy or a particular policy or policies, by number or otherwise, he may also do by a will identifying the policy or a particular policy or policies by number or otherwise."

Before the decision of the case *Re Lynn*, it seems to Judgment.
have been at least doubted that a declaration and appor- Ferguson, J.
tionment could be strictly and properly made by will.
Now the provisions are express that this can be done.
In that case the real and personal estate, including the
insurance, was given by the will as in the present case,
but the policy was designated by the name of the associa-
tion which is not done in respect to three policies in ques-
tion in the present case, or any of them.

The question, and as I think, the only remaining ques-
tion is whether or not a specific identification of the
policies by number, by name, by date, or amount insured
is necessary in a case where the testator has given all
his policies of insurance for the benefit of his children. In
respect to this immediate question I was not referred to
any authority, nor have I found any. I am, however, of
the opinion that though not identified by number the
policies are otherwise identified when all the policies are
given. The policies that are meant seem to me to be
made entirely certain in this way, and no room for doubt,
error, or mistake, is left remaining.

The giving of the policies in conjunction with the real
and personal property is the same as in *Re Lynn*; and I
think the identification in the manner mentioned alone
sufficient to satisfy the requirements of the statute. I
think the children of the testator are entitled to the bene-
fit of these three policies, and that the moneys arising on
them are not available to the creditors of the testator.

I think this answers all that I was required to answer on
this motion.

The costs of all parties should be out of the fund arising
on these three policies, and the executors should have
trustees' costs.

Subsequently the learned Judge made the following
addition to his judgment :

Counsel think that there is one policy not covered by
the judgment. I think that, assuming this to be so, the
fault is that of counsel themselves.

Judgment. This policy is in the Foresters, and dated the 13th November, 1896, for the sum of \$1,000. This was issued after the date, the actual date of the will, and consequently any apportionment as to it or the moneys arising upon it must likewise be after the date of the will, and I am of the opinion that the will cannot affect any apportionment in respect of this policy.

It went under the will with the personal property and some other policies to the executors, and is not by the will apportioned to the children of the testator. It will, therefore, be as personal property in the hands of the executors untrammelled by any apportionment by the will in favour of the children.

This policy as it stands is payable to the testator himself and is simply part of the personal estate. I see no reason why the moneys arising upon it should not be applied so far as necessary for the payment of debts of the testator.

G. F. H.

[DIVISIONAL COURT.]

QUICK V. TOWNSHIP OF COLCHESTER SOUTH.

Equitable Assignment — Designation of Funds — Alternative — Notice — Agreement.

A contractor, having done work under his contract with the defendants, and having brought an action against them for the contract price and for extra work, gave the plaintiff the following order :—

“S. Baltzer, Esq., Reeve Col. South.

“Please pay William Jackson Quick the sum of \$100 on account of my contract on the Richmond drain outlet.”

Nearly a year afterwards—the action having been in the meantime referred and another action brought by the contractor against the defendants for damages for overflowing his land—he gave the plaintiff a second order, as follows :—

“To the Reeve, Deputy-Reeve, and Councillors of Colchester South.

Sirs,—Will you kindly pay to W. J. Quick the sum of \$144.25, and charge to my contract on Richmond drain outlet or damage suit.”

Shortly after this, the referee made his report finding \$139.40 to be due to the contractor, after deducting money paid by the defendants before action and the amounts of certain other orders given by him in favour of a number of persons, not including the plaintiff.

Each party having appealed from the report, a settlement of both actions was agreed upon and carried out, by which, *inter alia*, the balance of \$139.44 was to be applied towards payment of the defendants' costs of the action for damages. Before the making of the agreement the defendants had notice of both the orders given to the plaintiff :—

Held, that both the orders were good equitable assignments ; the second being an assignment of either of two specific funds, and the defendants being bound to treat it as an assignment of the one which did arise.

The agreement, carried out as it was, established conclusively that the defendants were indebted to the contractor in \$139.44, and, having had notice of the orders before the agreement, they were bound to apply that sum to them, instead of in the manner provided in the agreement.

THIS was an appeal by the defendants from the judgment of the County Court of Essex in favour of the plaintiff, in an action in that Court, awarding him a recovery of \$139.44, under the following circumstances. Statement.

One Sorenson entered into a contract with the defendants on the 28th July, 1891, for the making or causing to be made 584 rods or the lower section of the Richmond drain, and to repair the 4th concession road culvert on the drain in the defendants' township ; and some time in the end of 1892, or in the beginning of 1893, Sorenson,

Statement. alleging the completion of the said contract, brought an action against the defendants for the contract price and for extra work done in respect of the contract.

On the 17th May, 1893, Sorenson gave to the plaintiff the following order :

“ S. Baltzer, Esq., Reeve Col. South.

“ Please pay William Jackson Quick the sum of one hundred dollars on account of my contract on the Richmond drain outlet.”

On the 10th January, 1894, the action was referred to Byron M. Britton, Esq.

Another action had been brought by Sorenson against the defendants for damages for overflowing of his land.

And on the 3rd April, 1894, Sorenson gave the plaintiff the following order :

“ To the Reeve, Deputy Reeve, and Councillors of Colchester South.

“ Sirs,—Will you kindly pay to W. J. Quick the sum of one hundred and forty-four dollars and twenty-five cents (\$144.25), and chg. to my contract on Richmond drain outlet or damage suit.”

On the 14th May, 1894, Mr. Britton made his report, by which he found Sorenson entitled to recover from the defendants \$139.44, made up as follows :

Contract price	\$1950 00
Less paid before action	1000 65
	<hr/>
	\$949 35
For extras.....	40 00
	<hr/>
	\$989 35
Taxes owing by Sorenson to defendants	44 45
	<hr/>
	\$944 90
Other orders given by Sorenson	805 46
	<hr/>
Balance due Sorenson.....	\$139 44

Each party gave notice of appeal from this report.

On the 10th August, 1894, it was agreed by the solicitor for Sorenson and the solicitors for the defendants as follows : Statement.

“ It is agreed that both these actions be settled as follows: the township to pay the taxes and the orders in question in this action; the plaintiff to be paid his contract price and \$40 for extras; the balance payable to the plaintiff remaining at 139.44, which is to be applied towards the defendants’ costs of the Queen’s Bench suit, which are fixed at \$163.09, subject to the reduction of said sum of \$139.44 by the garnishee proceedings now pending in the Fourth Division Court, Essex, in case the township be held responsible for the amounts garnished. The plaintiff’s costs of the Common Pleas case, which are fixed at \$251.67, to be paid to the plaintiff’s solicitor.”

This agreement was carried out by the parties, and the garnishee proceedings referred to were dismissed.

This action was afterwards brought by the plaintiff upon the orders given by Sorenson in his favour. The plaintiff claimed \$200, abandoning \$44.25. He recovered judgment for \$139.44, the amount found due to Sorenson by the report of Mr. Britton.

The defendants’ appeal was heard by a Divisional Court composed of ARMOUR, C.J., and STREET, J., on the 8th June, 1899.

Aylesworth, Q. C., for the appellants. The report or judgment of Mr. Britton is not evidence against the defendants: *Allan v. McTavish* (1883), 8 A. R. 440. The report is not a judgment, and, at all events, was superseded by the agreement signed by the solicitors. The \$40 extras could not be a part of the fund on which the orders were given. There should be no recovery in respect of the second order; it was not upon any particular fund. The first order is not addressed to the council at all. The claim was beyond the jurisdiction of a County Court.

F. A. Anglin, for the plaintiff. There is a judgment tantamount to an estoppel, for there is privity between

Argument. Sorenson and the plaintiff. The action is for whatever there may be in the defendants' hands up to \$200. Formal entry of the judgment is not necessary: 57 Vict. ch. 56, secs. 101, 106 (O.); *Davidson v. Taylor* (1890), 14 P. R. 78; *Holtby v. Hodgson* (1889), 24 Q. B. D. 103. *Allan v. McTavish* (1883), 8 A. R. 440, is not in point, because there was privity here. When the assignment is after the commencement of the action, it is the same as if it were after judgment: *Central National Bank of Boston v. Hazard* (1887), 30 Fed. R. 484; *Bennett v. Couchman* (1866), 48 Barb. at pp. 83, 84; Everest & Strode on Estoppel, p. 27. The judgment establishes the existence of the liability at the time of giving the orders. The first order designated a fund, and was on Baltzer as reeve. The second order does in effect designate a fund, in an alternative way. It is not competent for the parties to settle so as to prejudice the rights of an assignee.

Aylesworth, in reply.

June 20, 1899. The judgment of the Court was delivered by

ARMOUR, C. J.:—

It is quite clear upon the evidence that before the making of the agreement the defendants had notice of both the orders given by Sorenson to the plaintiff.

This agreement, carried out as it was, established conclusively that the defendants were indebted to Sorenson in the sum of \$139.44.

And, if these orders operated as equitable assignments, the defendants, having had notice of them before the agreement was entered into, were bound to apply this sum of \$139.44 to them, instead of in the manner provided by the agreement.

There can be no doubt that the first of these orders was a good equitable assignment, but a doubt arises as to the second of them. And this doubt arises from its terms,—

“and charge to my contract on Richmond drain outlet or Judgment.
damage suit.”

Armour, C.J.

This order was, in my opinion, a good equitable assignment of either of two specific funds—the fund arising from Sorenson’s contract on Richmond drain outlet, and the fund which might arise from his action for damages. And if both these funds had arisen, the defendants might have treated the order as an equitable assignment of whichever they chose.

But, by reason of the agreement which was made, no fund ever did arise from the action for damages, and the defendants were, therefore, in my opinion, bound to treat the order as an equitable assignment of the fund which did arise.

The amount properly claimable and recovered, \$139.44, was clearly within the jurisdiction of the County Court.

The appeal must be dismissed with costs.

E. B. B.

GUNN V. HARPER ET AL.

Action—Jurisdiction—Redemption—Foreign Lands—Constructive Trustees—Limitation of Actions.

Action to have it declared that a conveyance of lands out of Ontario, made in 1878, by the plaintiff to one of the defendants, though absolute in form, was in equity a mortgage, and for redemption. The grantee in 1893 made an absolute conveyance of the lands to the other defendants. All the parties resided in Ontario:—

Semble, that had the plaintiff's grantee not conveyed to others, and the action been against him alone, it would have lain; but

Held, that the Court had no power to declare the other defendants constructive trustees of foreign lands; and also that their defence of the Statute of Limitations raised a question of title the determination of which involved the application of the law of the foreign country.

Statement. THIS was an action tried by MEREDITH, C.J., without a jury, at Kingston, on the 5th June, 1899. The facts are stated in the judgment.

G. M. Macdonnell, Q.C., and *J. M. Farrell*, for the plaintiff.

F. King, for the defendant Gunn.

Whiting, for the other defendants.

July 18, 1899. MEREDITH, C.J.:—

Effect must, in my opinion, be given to the objection of Mr. Whiting that there is no jurisdiction in the Courts of this Province to give the relief which the plaintiff claims.

The action is brought to have it declared that a conveyance made in the year 1878 by the plaintiff to the defendant Gunn of lands in the Province of Quebec and mining property in Colorado, though absolute in form, was intended to be and was in equity a mortgage, and for redemption; for the appointment of a receiver and an injunction to restrain the defendants from parting with the property or executing any further conveyances of any interest in it.

The defendants other than the defendant Gunn are persons deriving title under an absolute conveyance of the

property made in the year 1893 by that defendant to the firm of A. Gunn & Co., which was composed of the defendant Gunn and the other defendants, who carried on business together in co-partnership under that firm name.

Judgment.

Meredith,
C..J

Had the action been against the plaintiff's grantee alone, and had the rights of the other defendants not been created by him, the authorities cited by Mr. Macdonnell would have warranted such a judgment as is asked for being pronounced, if the plaintiff were otherwise entitled to that relief.

The granting of relief in such cases is an exception to the general rule that the Courts of this Province have no jurisdiction to entertain an action for the determination of the title to, or the right of possession of, any immovable situate out of Ontario, and proceeds upon the principle that courts of equity are, and always have been, courts of conscience, operating *in personam* and not *in rem*, and in the exercise of their personal jurisdiction have always been accustomed to compel the performance of contracts and trusts as to subjects which are not either locally or *ratione domicilii* within their jurisdiction: Dicey on Conflict of Laws, Rule 39, pp. 214, 218.

"This indefinite jurisdiction," says Mr. Dicey, "is exceptional and is (substantially) confined to cases in which there is either a contract between the parties or something in the nature of a trust:" *ib.* p. 218.

The case is, as to the application of the rule and its exception, not unlike that of *Norris v. Chambres* (1861), 29 Beav. 246, affirmed (1861), 3 DeG. F. & J. 583. I refer particularly to what was said by the Master of the Rolls at p. 256.

In re Hawthorne, Graham v. Massey (1883), 23 Ch. D. 743, is also against the plaintiff on this point, and shews that the Court has no power to declare a person, though he is resident within the jurisdiction, a constructive trustee of foreign lands.

I am inclined also to think that there is another reason why the Court has no jurisdiction to entertain the plain-

Judgment. tiff's claim. The defendants other than the defendant
Meredith, Gunn set up that the plaintiff's title has been extinguished
C.J. by the operation of the Statute of Limitations. That, as
it appears to me, directly raises a question of title, the
determination of which involves the application of the law
of the foreign country.

Whatever may be the rule as to the law which is to be applied where it is the remedy and not the right which is alleged to be extinguished, where it is the latter, as in this case, the law of the *situs* is that which governs.

The tendency of the modern cases is in the direction of limiting the occasions and circumstances in which our Courts will assume jurisdiction as to lands situate in a foreign country, and if I err in this case, I prefer to do so in endeavouring to follow the trend of the recent decisions, rather than to risk falling into the mistake of extending the limits within which the jurisdiction which the plaintiff invokes may properly be exercised.

Upon the general question reference may be had to *Burns v. Davidson* (1892), 21 O. R. 547; *Pavey v. Davidson* (1896), 23 A. R. 9, (1896), 26 S. C. R. 412; *Henderson v. Bank of Hamilton* (1893), 20 A. R. 646, (1894), 23 S. C. R. 716; and to *Black Point Syndicate v. Eastern Concessions* (1898), 15 Times L. R. 117.

The action must, therefore, in my opinion, be dismissed with costs.

E. B. B.

[DIVISIONAL COURT.]

DAVIDSON V. GARRETT ET AL.

Coroner—Post-mortem Examination—Direction to Surgeons—Impanelling of Jury—County Crown Attorney—Consent in Writing—R. S. O. ch. 97, sec. 12 (2)—Construction—Imperative or Directory—Damages.

The wife of the plaintiff having died suddenly, the defendants, three practising physicians and surgeons, acting under a verbal direction from a coroner for the city where the death occurred and the body lay, entered the house of the plaintiff for the purpose of making, and made there, a post-mortem examination of the dead body. The coroner had issued a warrant to impanel a jury for the purpose of holding an inquest on the body, but the warrant was afterwards withdrawn without the knowledge of the defendants. There was no consent in writing of the County Crown Attorney:—

Held, that the coroner, having authority to hold an inquest upon the body, and having determined that it should be held, and having begun his proceedings, had power to summon medical witnesses to attend the inquest and to direct them to hold a *post-mortem*.

Held, also, that no rule of law forbade the making of the *post-mortem* before the impanelling of the jury; that was a matter of procedure in the discretion of the coroner.

Held, also, that the meaning of sec. 12 (2) of R. S. O. ch. 97 was that the coroner should not, without the consent of the Crown Attorney, direct a *post-mortem* examination for the purpose of determining whether an inquest should be held, but only where the coroner had determined to hold an inquest and gave the direction as part of the proceedings incident to it; but if the provision should be read differently, it was at all events merely directory, and did not render an act done by a surgeon in good faith, under the direction of a coroner, unlawful because the coroner had neglected to obtain the prescribed consent, where the act would be lawful if the consent had been obtained.

Semble, also, that if the verdict for the plaintiff had been allowed to stand, the amount of damages assessed, \$600, was excessive.

MOTION by the defendants to set aside the verdict and judgment in favour of the plaintiff in an action tried before MEREDITH, J., and a jury, at Toronto, on the 3rd February, 1899, and to dismiss the action, or, in the alternative, for a new trial. Statement.

The defendants were practising physicians and surgeons, and the plaintiff alleged in his statement of claim that they, on the 8th February, 1898, without any legal authority, justification, excuse, or license, and against the will of the plaintiff, unlawfully entered his premises in the city of Toronto, and remained there for a considerable time,

Statement. although ordered off by the plaintiff, and while there did cut and mutilate the dead body of Ellen Davidson, the plaintiff's wife.

The defendants justified under a direction given them by one of the coroners of the city of Toronto to make a post-mortem examination for the purpose of ascertaining the cause of death. This direction was not in writing, nor was any consent in writing or otherwise given by the County Crown Attorney, in accordance with sec. 12 (2) of the Act respecting Coroners, R. S. O. ch. 97. No notice of action was given to the defendants.

The jury found for the plaintiff with \$600 damages, and judgment was thereupon directed to be entered for the plaintiff against the defendants for the amount found by the jury with costs.

The trial Judge asked the jury whether the defendants honestly believed that all things that were necessary had taken place to authorize them to do what they did. The jury answered: "We have no means of knowing from the evidence what the defendants believed, but in our opinion we answer to the question, no."

The defendants' motion was heard by a Divisional Court composed of MEREDITH, C. J., and ROSE, J., on the 7th April, 1899.

E. F. B. Johnston, Q.C., for the defendants. The action is in fact for trespass to land by entering the house without license, and what was done to the body was shewn in aggravation of damages. The defendants were entitled to notice of action, having acted *bonâ fide* in the discharge of a public duty: *Scott v. Reburn* (1894), 25 O. R. 450. There was in fact, no trespass, as the defendants entered the house by permission of a member of the family; and no action can be held to lie for what was done to the body, and no damages could be assessed therefor. The defendants were justified in what they did by the verbal instructions of the coroner, and he had authority to give the instructions; the defendants were not notified of the

withdrawal of the warrant. The finding of the jury was perverse, and the damages, at all events, were excessive. Argument.

Robinette, for the plaintiff. No notice of action was necessary, as the defendants were not performing a public duty: *Kelly v. Barton* (1895), 26 O. R. 608, 22 A. R. 522; *Cleland v. Robinson* (1862), 11 C. P. 416; *Jones v. Grace* (1889), 17 O. R. 681; *Hodgins v. Corporation of Huron and Bruce* (1866), 3 E. & A. 169. [MEREDITH, C. J.—We are in your favour on that point.]

John M. Godfrey, on the same side. Three things were necessary to give the defendants authority to enter upon the premises of the plaintiff for the purpose of making the examination: (1) A warrant for an inquest; (2) the consent of the Crown Attorney; (3) a written direction from the coroner. None of these requisites existed, and there was thus a total absence of authority. The jury gave the only answer to the question asked by the Judge which could have been given. The defendants were presumed to know the law and to know that these three things were required to authorize a lawful entry. They could not have a *bonâ fide* belief that everything had been done which should have been done, because there was nothing on which they could found their belief: see *Agnew v. Jobson* (1877), 47 L. J. N. S. M. C. 67; *Cook v. Leonard* (1827), 6 B. & C. 351; *Alcock v. Andrews* (1788), 2 Esp. 542; *Griffith v. Taylor* (1876), 2 C. P. D. 194; *Connors v. Darling* (1864), 23 U. C. R. 541; *Cod v. Cabe* (1876), 45 L. J. N. S. M. C. 101.

Johnston, in reply.

July 11, 1899. MEREDITH, C.J.:—

The action of the plaintiff, as presented in the pleadings, at the trial, and in the argument before us, is one of trespass *quare clausum fregit*, and the cutting and mutilating of the dead body of the plaintiff's wife are alleged in aggravation of the damages which the plaintiff seeks to recover for the alleged trespass, probably because,

Judgment. according to the law of England as introduced into this
Meredith, Province, there is no property in a dead body, and a
C.J. trespass cannot be committed in respect of it.

The wife of the plaintiff had died suddenly, and a question arose as to whether the plaintiff could obtain a certificate of death so as to permit the interment of the body. The defendants, acting under a verbal direction from Dr. Johnson, a coroner for the city of Toronto, where the death occurred and the body lay, entered the house of the plaintiff for the purpose of making, and made there, a post-mortem examination of the dead body of his wife, and it is for this that the plaintiff brings his action.

It appears from the evidence—a statement of the plaintiff sworn to by one of the witnesses, and not denied by the plaintiff—that Dr. Johnson had issued a warrant to impanel a jury for the purpose of holding an inquest on the body, but that the warrant was subsequently withdrawn. It does not, however, appear when the withdrawal of the warrant took place, but it must have been after the direction was given to the defendants to hold the post-mortem, and the fact of its withdrawal was not communicated to or known by the defendants, or any of them, until after the acts of which the plaintiff complains were done.

If in these circumstances what the defendants did was a lawful act, the plaintiff must of course fail, for his action is based solely upon the ground that the defendants' acts were unlawful.

A coroner's court is a court of record, and the coroner is a judge of a court of record: *Thomas v. Churton* (1862), 2 B. & S. 475; *Jervis on Coroners*, 5th ed., p. 62; *Boys on Coroners*, 2nd ed., pp. 2, 208.

The powers and jurisdiction of coroners are of very ancient origin, and do not depend upon the provisions of any statute, though statutes have been passed both in England and in Canada dealing to some extent with their duties and powers. The provincial statute R. S. O. ch. 97 is one of such statutes.

I am unable to find anything which makes it essential to the constitution of the coroner's court or to the exercise by him of his judicial functions with regard to a dead body, or the holding of an inquest, that he should issue his warrant for the summoning of a jury for the purpose of the inquest; that is, no doubt, the usual course taken, but there is no reason that I can see why the coroner, if he chooses to do so, may not himself impanel the jury, summoning them to attend by a verbal direction for that purpose given by himself, and, indeed, a case might arise in which such a course might be not only convenient but almost necessary. In Nova Scotia and Prince Edward Island that he may do so is provided by statutory enactment (Nova Scotia R. S. 1888, 5th ser., ch. 17, sec. 3; Prince Edward Island, 39 Vict. ch. 17, sec. 2).

Judgment.
Meredith,
C.J.

If I am right in this view, whether or not Dr. Johnson had issued his warrant, Dr. Johnson having had authority to hold an inquest upon the body of the plaintiff's wife, and having determined, as he had, that it ought to and should be held, and having begun his proceedings, had, unless R. S. O. ch. 97 affects his power and authority as coroner, power to summon medical witnesses to attend the inquest and to direct them to hold a post-mortem.

It is plain, I think, that, though the ordinary course is to issue a summons to the medical witness whose attendance is required, that formality is unnecessary if the witness chooses to attend upon the verbal or other request of the coroner, and there is nothing which requires that the direction to the medical witness to hold the post-mortem should be in writing.

It is suggested that the post-mortem ought not to take place until the jury which has been impanelled has viewed the body. Referring to this question, Mr. Justice Rapallo, in *The People v. Fitzgerald* (1887), 105 N. Y. at p. 152, said that the point of law as to whether the post-mortem could be held before the coroner impanels the jury was debatable; but in *Jervis on Coroners* it is said that in all cases of sudden or violent death, and especially

Judgment.
Meredith,
C.J.

where it is likely that a criminal charge will be made against some person, it is desirable that a surgeon should be called as a witness, and that it is also very desirable that he should prepare himself to give the required evidence by making a careful examination of the body, not only externally or of the supposed seat of injury, but of the different cavities and of the head, and by taking written notes of the appearances: and that if this is done before the meeting of the Court, time may be saved and the trouble and inconvenience of an adjournment avoided: 5th ed., p. 30.

It seems to me that no absolute rule can be laid down on the subject and, as far as I have been able to discover, no rule of law exists which forbids the making of the post-mortem before the impanelling of the jury takes place. The matter is one of procedure, I think, to be determined on the facts of each case by the coroner in the exercise of his discretion.

Does then the statute referred to affect the question? It is provided by sub-sec. 2 of sec. 12 as follows:

“(2) In no case shall any coroner direct a post-mortem examination to be made without the consent in writing of the County Crown Attorney unless an inquest is actually held.”

This provision assumes that a coroner has jurisdiction to direct a post-mortem examination to be made without holding an inquest, and its purpose was to prevent a municipality being unnecessarily burdened with the expense of such an examination.

The term “inquest” cannot have been used in its ordinary sense. So to read it would make nonsense of the enactment. “Inquest” includes all the proceedings down to and including the requisition, and it can scarcely have been intended that a post-mortem, for the purpose of ascertaining the cause of death for the information of the coroner’s court, should not take place until that question had been passed upon and the inquiry had been determined. What was intended was, I think, that the coroner should

not without the required consent, direct a post-mortem examination for the purpose of determining whether an inquest should be held, but only where he has determined to hold an inquest and gives the direction as part of the proceedings incident to it.

Judgment.
Meredith,
C.J.

If the provision is, however, to be read differently, it is in form directory, and does not, I think, render acts done by a surgeon in good faith under the direction of a coroner unlawful because the coroner has neglected to obtain the prescribed consent, where those acts would be lawful had the consent been obtained.

I come, therefore, to the conclusion that the coroner was acting within his jurisdiction in directing the defendants to hold the post-mortem, and that they had, therefore, the right to enter the house of the plaintiff where the dead body lay, for the purpose of making and to make the post-mortem examination of it which they had been directed to make, and that the plaintiff's action therefore fails.

It would be, as it seems to me, a most unsatisfactory condition of things if a surgeon who has been directed by a coroner, acting within his jurisdiction, to make a post-mortem examination of a dead body for the purposes of an inquest which the coroner in the exercise of his judicial discretion has determined to hold upon it, be answerable as a wrong-doer for what he does unless he is able to shew that the coroner has acted in strict conformity with the law in his proceedings antecedent to the giving of the direction under which he acts, where what he does would not be actionable had the coroner proceeded regularly.

If I had come to a different conclusion on the branch of the case which I have dealt with, it would have been necessary to consider whether there was evidence to go to the jury of a trespass in fact. As to that, although I have not formed a definite opinion, the inclination of my mind is against the plaintiff.

Had I been of opinion that the plaintiff is entitled to succeed, the damages are, in my opinion, excessive, and should be reduced to a practically nominal sum. The de-

Judgment.
Meredith,
C.J.

defendants acted in good faith and in the honest belief that they were discharging an important public duty. The holding of an inquest would have been proper, having regard to the circumstances attending the death of the plaintiff's wife; he himself anticipated that an inquest would or might be held. It is not pretended that the defendants acted otherwise than with a due regard to the feelings of those connected with the dead woman, or that unnecessary violence was used or any indignity offered to the body, but all that was done was done decently and in order—if the defendants had authority to make the post-mortem.

Therefore, had the conclusion been that the plaintiff was entitled to recover, the damages should have been reduced, as I have indicated, counsel having consented to our reducing them if we should think the damages were excessive.

The appeal should, in my opinion, be allowed and the findings of the jury and the judgment entered thereon be set aside, and in lieu thereof judgment should be entered dismissing the action, all with costs to be paid by the plaintiff to the defendants.

ROSE, J.:—

It is beyond question that the coroner is a judge of a court of record. That being so, he has all the powers of such a court, and the maxim *omnia præsumentur rite et solenniter esse acta* applies; and Dr. Garrett was, I think, quite justified, and, apart from the order being a parol one, was bound to act upon the order of the coroner. I do not say how it would have been had he declined to act upon a parol order. The case of *Gosset v. Howard* (1847), 10 Q. B. 411, is an instructive case. This is referred to in Broom's Legal Maxims, 6th ed., at p. 907.

Unless it was necessary to have the order to make the post-mortem in writing, in order to give it validity and constitute it a justification of Dr. Garrett's act, there seems to be no question as to the order being a protection,

and it being a matter within the jurisdiction of the coroner, as I shall point out, it was the duty of Dr. Garrett to assume that all the formalities had been complied with necessary to make the order effective.

Judgment.

Rose, J.

An instructive article on the office of a coroner is found in the American & English Encyclopædia of Law, 2nd ed., vol. 7, sub tit. "Coroner;" also in Bouvier's Law Dictionary, sub tit. "Inquest," where we find that "inquest" has at least three meanings, one being "a body of men appointed by law to inquire into certain matters: as, the inquest examined into the facts connected with the alleged murder. The grand jury is sometimes called the grand inquest." Another, "The judicial inquiry itself by a jury summoned for the purpose, is called an inquest. The finding of such men, upon an investigation, is also called an inquest, or an inquisition."

In the statute R. S. O. ch. 97 the word is apparently used with different meanings. It seems to me that in subsec. 2 of sec. 12, where a coroner is required not to "direct a post-mortem examination to be made without the consent in writing of the County Crown Attorney, unless an inquest is actually held," the meaning with which the word is used is "inquiry," for I find in sec. 11 that the medical practitioner to whom a direction to make a post-mortem examination is permitted to be given is one summoned as a witness to attend the inquest; and to the same effect is sec. 12. It would seem, therefore, as if the intention of the Legislature was that a jury must be summoned and a date fixed for the beginning of the inquiry or inquest, and then a medical witness summoned to attend such inquiry may be directed to make the post-mortem. In sec. 12 the words are: "The coroner may at any time before the termination of the inquest direct a post-mortem examination." The opening words of sec. 11 are "where upon the summoning or holding of a coroner's inquest the coroner finds," etc. If, therefore, the sole powers given to the coroner were those conferred upon him by that Act, and if he were an officer of an inferior court, it may be

Judgment. that it would be necessary not only to fix the day for the
Rose, J. hearing, but to formally summon the medical practitioner as a witness, and together with the summons give direction for the holding of the inquest; and it may be that, in order to subject the medical practitioner to the penalty provided by the statute (sec. 15), the formalities of the statute must be complied with. Here, however, it is clear, both from the statement of the plaintiff and from the evidence of Dr. Garrett, uncontradicted, that a warrant had been issued, and therefore a day had been appointed, and that the coroner had told Dr. Garrett to perform a post-mortem examination. What Dr. Garrett said, in effect, was this: that the coroner called him up by telephone late in the day and told him he had been and seen the body and that a post-mortem would be necessary, and gave him instructions to make the post-mortem, and that he made the post-mortem in pursuance of such instructions. He further said that the coroner (Dr. Johnson) had telephoned him that he had issued a warrant for the inquest, and when the coroner telephoned him that he had issued the warrant for the inquest, and instructed him to go and perform a post-mortem, he thought he had sufficient authority.

If a literal compliance with the statute were necessary, one can see how it would be almost impossible to prevent disaster, and, having regard to the duties and powers of the coroner at common law and under the statute, I agree that what here took place was a sufficient warrant or authority to Dr. Garrett to perform the post-mortem examination.

I also agree that the damages were excessive, and must, if the finding in favour of the plaintiff had stood, have been reduced to a nominal sum, for the reasons given by the learned Chief Justice.

I have given the question of whether there was a trespass in fact much consideration, and I also find my mind going against the plaintiff on this question, although I have not reached a definite conclusion.

I agree that the appeal should be allowed and the action dismissed with costs.

[DIVISIONAL COURT.]

ARNOLD ET AL. V. VAN TUYL ET AL.

Appeal—County Court—Order for Security for Costs—Interlocutory Order—R. S. O. ch. 55, sec. 52 (1)—Security for Costs of Appeal—Stay of Appeal—Rule 825.

In an action in a County Court, after judgment therein dismissing the action with costs and notice of appeal therefrom to the High Court given by the plaintiffs, an order was made by the Judge of the County Court, upon the application of the defendants, requiring the plaintiffs, within four weeks, to give security for the costs of the action in addition to security already given, staying proceedings in the meantime, and directing that, in default of security being given within the time limited, the action should be dismissed with costs:—

Held, that this order was not in its nature final, but merely interlocutory, within the meaning of sec. 52 (1) of the County Courts Act, R. S. O. ch. 55, and no appeal lay therefrom.

Held, also, that the provision of Rule 825, that no security for costs shall be required on a motion or appeal to a Divisional Court, applies to County Court appeals; and it must be assumed that the security ordered was not intended to extend to the costs of the appeal to the High Court from the judgment dismissing the action, nor the stay to the appeal itself.

AN appeal by the plaintiffs from an order of the junior Statement.
Judge of the County Court of Lambton, in Chambers, in an action in that Court (after judgment in favour of the defendants dismissing the action with costs) requiring the plaintiffs, within four weeks, to give additional security for the costs of the action—they intending to appeal from the judgment dismissing the action—and staying proceedings in the meantime, and ordering that in default of security being given within the four weeks, the action should be dismissed with costs.

The appeal was heard by a Divisional Court composed of MEREDITH, C. J., and ROSE, J., on the 5th April, 1899.

R. McKay, for the plaintiffs, contended that judgment having been given in the action dismissing it with costs, the Judge was *functus officio*, and could not make any further order dismissing the action, and that, as there was no provision by statute or Rule of Court requiring security to be given for the costs of an appeal from the judgment

Argument. of a County Court, so a plaintiff cannot be required to give further security for costs of the action as a condition of being allowed to appeal.

C. J. Holman, for the defendants, objected that no appeal lay from the order in question, and also opposed the appeal on the merits.

Cur. adv. vult.

Subsequently, on the 11th May, 1899, the plaintiffs' appeal from the judgment dismissing the action was heard by the same Court.

July 7, 1899. ROSE, J.:—

This was an appeal from an order made by the junior Judge of the County Court of the county of Lambton increasing the amount of security directed to be given by a previous order.

Objection was taken that this was not an appealable order, not being in its nature final, but merely interlocutory: see sec. 52 of the County Courts Act, R. S. O. ch. 55.*

As to the effect of the proviso, see *Baby v. Ross* (1892), 14 P. R. at p. 443.

I think this contention is entitled to prevail. The order seems to me to be merely interlocutory: see *Standard Discount Co. v. LaGrange* (1877), 3 C. P. D. 67, and other cases cited in *Holmsted & Langton*, 2nd ed., pp. 119-120 and 982, especially *O'Donohoe v. Bourne* (1897), 27 S. C. R.

* 52.—(1) An appeal shall also lie to a Divisional Court of the High Court of Justice, at the instance of any party to a cause or matter, from every decision made by a Judge of a County Court under any of the powers conferred upon him by any Rules of Court or any statute, unless provision is therein made to the contrary; and from every decision or order made by a Judge of a County Court sitting in Chambers under the provisions of the law relating to interpleader proceedings, the examination of debtors, attachment of debts, and proceedings against garnishees; and from every decision or order made in any cause or matter disposing of any right or claim, provided always that the decision or order is in its nature final and not merely interlocutory.

654, where authorities are collected by Mr. Justice Taschereau.

Judgment.

Rose, J.

It is not open to us to consider the objections raised to the order.

The order limited the time within which the further security should be given to four weeks from the date of the order, stayed further proceedings in the meantime, and provided that, in default of furnishing the security within the four weeks, the action should be dismissed with costs.

It was urged that the order was *ultra vires*.

The judgment of the learned Judge at the trial was for dismissal of the action. This order was pronounced on the 23rd January. On the 21st February following, notice of motion by way of appeal to the Divisional Court was given, and filed on the 22nd February. The order for further security was made on the 6th March. The proceedings were certified on the 28th April.

Con. Rule 825 provides that no security for costs shall be required on a motion or appeal to a Divisional Court. This applies to County Court appeals: Holmsted & Langton, 2nd ed., p. 1000. This being so, we must assume that it was not intended by the order for security for costs that it should extend to the costs of the appeal to this Court, or that the stay should operate to prevent such appeal, and, as the learned Judge whose judgment is appealed against has certified the proceedings, it would seem that such was his view.

However that may be, as we have no jurisdiction to review his order, it must stand for what it is worth, and the motion against it must be dismissed with costs, and we must proceed to dispose of the appeal, which came on before us in the ordinary way, without any motion to quash or set it aside.

[The learned Judge then dealt with the merits of the main appeal, holding that it should be dismissed.]

MEREDITH, C. J. :—

I agree.

E. B. B.

[DIVISIONAL COURT.]

RE ONTARIO MUTUAL LIFE ASSURANCE CO. AND
FOX ET AL.

Executors and Administrators—Life Insurance Policy—Domicil of Insured—Possession of Policy—Assignment—Foreign Administrator—Domestic Administrator—Domestic Insurance Company—Administration—Foreign Creditors—Agreement—Construction.

The company, having its head office in Ontario, insured the life of a person then domiciled in Ontario, by two policies, one for \$2,000 and the other for \$3,000, payable to his executors or administrators at his death, at such head office. These policies were assigned by the insured to certain persons in Ontario, and an agreement in writing was subsequently made between the insured and these persons, by which his indebtedness to them was settled by his giving two promissory notes for \$500 each, and by which it was also provided that the policies should be reassigned to the insured "upon the payment * * * of the first of the said \$500 promissory notes, and shall in the meantime be held as collateral security for the payment of the said \$500 note * * * and the said (insured) shall be bound to keep up all premiums in the meantime, and if not paid when due, the said premiums may be paid by (the assignees), and the payments so made shall be added to said (insured's) indebtedness, to which said policies shall remain as collateral security therefor."

The insured died in a foreign country, where he had been for some time domiciled, having in his actual possession, at the time of his death, one of the policies.

Letters of administration to his estate were granted by a court in the country where he died to a person there, and also by a Surrogate Court in Ontario to one of the assignees of the policies:—

Held, that, although the locality of a specialty is where it is conspicuous at the time of the death, that means, where it is rightly conspicuous, and, as the assignees were entitled in law to the possession of the policy, it was conspicuous, not where it actually was at the death, but where it rightly ought to have been; and the rule that the locality of a specialty is the jurisdiction in which letters of administration are to be granted is subject to this qualification—if the specialty can be recovered and enforced in the country where it is found at the death; and, assuming that letters were properly granted by the foreign court, the policy could not have been enforced and the moneys payable thereby recovered in the foreign country, for the insurance company, being as to that country a foreign corporation and not doing business therein, could not be sued there.

The appointment of an administrator in Ontario was, therefore, necessary; and the insurance company having paid the insurance moneys into Court, they should be handed over to that administrator to be administered.

Held, also, that, upon the true construction of the agreement, the assignees were entitled only to the amount of the first one of the promissory notes, with interest from its maturity, and to the amount of the premiums paid by them since the date of the agreement, with interest.

JAMES HENRY McROBERTS, then domiciled in the village of Lucan, in the Province of Ontario, effected an insurance on his life in the above-named company, to the amount of \$2,000, under a policy dated the 15th May, 1882, and numbered 7935, payable to the assured, his executors, administrators, or assigns, at the head office of the company in the town of Waterloo, in the Province of Ontario, at the expiration of twenty years, or within thirty days after proof of the death and age of the assured. Statement.

This policy was assigned by the assured to R. and J. Fox on the 20th December, 1888.

On the 13th July, 1886, McRoberts effected a further insurance on his life in the same company, to the amount of \$3,000, under a policy numbered 14294, payable to the executors, administrators, or assigns of the assured, at the head office, within thirty days after proof of the death and age of the assured.

This policy was assigned by the assured to John Fox on the 21st August, 1891.

By a memorandum of agreement made the 21st July, 1897, between James H. McRoberts and his wife, of the one part, and D. B. Cornell and R. & J. Fox, of the other part, it was, amongst other things, agreed: "That all accounts and claims of every nature and kind by any of the parties against the others of the parties are settled to the date hereof. The said James H. McRoberts gives, in settlement of all claims by D. B. Cornell and R. & J. Fox against him, his two promissory notes for \$500 each, one payable twelve months from this date and the other twenty-four months from this date, to R. & J. Fox, without interest, and the liability of the said James H. McRoberts to D. B. Cornell and R. & J. Fox, save as otherwise herein provided and save as to the two promissory notes, is settled and at an end. * * The policies upon the life of the said James H. McRoberts, being policies in the Ontario Mutual Life Assurance Company numbers 7935 and 14294, shall be assigned by the said R. & J. Fox to the said James H. McRoberts upon the payment

Statement. before or at maturity, or within three months thereafter, of the first of the said \$500 promissory notes, and shall in the meantime be held as collateral security for the payment of the said \$500 note falling due twelve months from the date hereof, and the said James H. McRoberts shall be bound to keep up all premiums in the meantime, and if not paid when due, the said premiums may be paid by R. & J. Fox, and the payments so made shall be added to said McRoberts's indebtedness, to which said policies shall remain as collateral security therefor."

On or about the 27th October, 1898, McRoberts died at the city of Robinson, in the county of Crawford, in the State of Illinois, one of the United States of America, where he had been domiciled for some time before his death, having at the time of his death in his actual possession the policy numbered 7935.

On the 16th November, 1898, one Everett Trimble was duly appointed by the County Court of the county of Crawford, administrator of all and singular the goods and chattels, rights and credits, which were of the said James Henry McRoberts at the time of his death.

Trimble, as such administrator, assigned the policy numbered 7935 to one L. E. Stevens.

Letters of administration of the personal property of McRoberts were on the 1st March, 1899, duly granted by the Surrogate Court of the county of Middlesex to John Fox, above mentioned.

A contest having arisen as to who were the persons entitled to the moneys payable by the insurance company in respect of the two policies, the company applied for an order for leave to pay such moneys into Court; and on the 1st May, 1899, an order was made by the Master in Chambers directing that the company should pay into Court \$3,245.49, less \$40 for their costs; that R. & J. Fox should receive out of the moneys, when paid in, \$920.86 in respect of the agreement of the 21st July, 1897, and \$25 for their costs; and that, of the balance, John Fox

should receive as administrator \$1,765, and L. E. Stevens Statement. \$494.63.

The claimants R. & J. Fox and John Fox appealed from this order in so far as it directed payment to Stevens of any portion of the moneys in Court, and in so far as it limited the amount payable to R. & J. Fox to \$920.86, the amount claimed by them being \$1,428.72.

The claimants Trimble and Stevens also appealed from the order in so far as it directed payment of any part of the proceeds of the first policy to John Fox as administrator.

These appeals were heard by ROSE, J., in Chambers, on the 5th May, 1899.

W. E. Middleton, for R. & J. Fox and John Fox, cited *Re Klæbe* (1884), 28 Ch. D. 175; *Milne v. Moore* (1894), 24 O. R. 456; *Blackwood v. The Queen* (1882), 8 App. Cas. at p. 92; Dicey's Conflict of Laws, p. 456; *Tyler v. Bell* (1837), 2 My. & Cr. at p. 109; Taylor on Evidence, 9th ed., sec. 1738; *Ewing v. Orr Ewing* (1885), 10 App. Cas. 453; *Price v. Dewhurst* (1838), 4 My. & Cr. 76; *Commissioner of Stamps v. Hope*, [1891] A. C. 476; *Preston v. Viscount Melville* (1841), 8 Cl. & F. 1; *Enokin v. Wylie* (1862), 10 H. L. C. 1, 19; *Logan v. Fairlie* (1825), 2 Sim. & Stu. 284.

McEvoy, for Trimble and Stevens, relied on *Gurney v. Rawlins* (1836), 2 M. & W. 87; *Attorney-General v. Bouwens* (1838), 4 M. & W. 171, 191; *Commissioner of Stamps v. Hope*, [1891] A. C. at p. 480; *Hard v. Palmer* (1860), 20 U. C. R. 208; *Waydell v. Provincial Insurance Co.* (1862), 21 U. C. R. 612; Wentworth on the Office of Executors, ed. of 1763, pp. 45, 47, 60; Westlake's Private International Law, secs. 95, 96; Dicey's Conflict of Laws, p. 348; *Hanrahan v. Hanrahan* (1890), 19 O. R. 396; *Whyte v. Rose* (1842), 3 Q. B. 493.

Middleton, in reply, referred to *Re Harrison* (1899), 18 P. R. 303.

Judgment. May 31, 1899. ROSE, J.:—

Rose, J.

The policies in question were issued by a company having its head office at the town of Waterloo, in this Province. The contract was made with the late James Henry McRoberts, while resident in the village of Lucan, in the county of Middlesex, also in this Province. The premiums and the insurance money were payable at the head office.

The contract was one, therefore, wholly within the Province, where were also the contracting parties, and any breach for non-payment of money would be within the Province.

It appears that the policies were assigned by McRoberts to R. & J. Fox, to secure advances made by them, and that of these assignments the company was duly notified, pursuant to the third condition of the policy.

It is, of course, clear that the assignees, R. & J. Fox, were entitled to the possession of both policies. They in fact obtained possession of one policy, number 14294. For some reason not explained, the other policy, number 7395, was retained by McRoberts and taken by him to the State of Illinois, one of the United States of America, and was in his possession at the time of his death.

I do not think as a matter of law that the policy was in his possession. He wrongfully held it, had physical control, but the right of possession, the legal possession, was in the assignees, and they might have maintained an action of trover against him or any one else in whose possession it might be and who refused to deliver it to them. In fact, they were somewhat in default in not getting possession. The difficulties arising from allowing the policy to remain in the custody of the insured are apparent, and are referred to in Bunyon's Law of Life Assurance, 3rd ed., p. 301, par. 15.

These facts distinguish this case from any other case cited, and make it very clear to my mind that the policy

was of the notable goods of the deceased to be administered within this Province.

Judgment.

Rose, J.

Very carefully prepared arguments in writing have been handed into me, which may remain with the papers, for the sake of reference, if the case is further considered. In these arguments many cases are referred to. I do not find it necessary to go through them, as I think the ground above stated is sufficient to rest my judgment upon.

Whyte v. Rose (1842), 3 Q. B. 493, is one of the most helpful. The head-note is as follows: "To an action of debt on a deed, by an administrator under a prerogative administration from the Archbishop of Canterbury, it is no answer that the intestate died abroad, and that, at the time of the death, the deed was in Ireland, and was *bona notabilia* to be administered in Ireland." It was further held (p. 509) that "no administrator could sue in the English Courts, in respect of the personal estate, wherever it was found at the death of the intestate, without an English administration."

I do not think it necessary for the determination of this case to consider where, if an action were brought on this policy, it must be brought, although possibly it would be a material element in determining the point in dispute, apart from what I have said. But it certainly has not been made to appear that any ground of jurisdiction exists in the foreign Court to entertain an action against the company in respect of any claim on the contract of insurance: Dicey on Conflict of Laws, pp. 47 and 369.

There could be no question in England now as to where such a debt would be situate. The Revenue Act, 1862, 25 & 26 Vict. ch. 22, sec. 39, declares that a debt due on a deed situate abroad from a debtor resident in England must be held situate in England: Dicey, p. 320.

I do not think that the alleged assignment by the foreign administrator makes any difference. He had nothing to assign, and the assignee takes nothing, unless, indeed, there be a surplus after payment of debts, which

Judgment. it is reasonably clear, from the evidence before me, there
Rose, J. cannot be.

The order of the Master in respect to policy No. 7935 must be reversed with costs.

This also disposes of the appeal of the claimants Trimble and Stevens, which must be dismissed with costs.

The appeal of R. & J. Fox must, I think, be allowed with costs. The effect of the last clause of the agreement was, I think, that if McRoberts had paid the first \$500 note at the maturity, or within three months thereafter, he would have been entitled to a re-assignment of the policies, but, failing to do that, the last words of the clause provided that the policies should remain as a collateral security to the indebtedness, *i.e.*, to the thousand dollars. R. & J. Fox are, therefore, entitled to the thousand dollars, to the premiums paid on the policies, and to the interest on the premiums from the date of payment until, say, the first of June, at six per cent., which money may be paid out to them. The balance of the money in Court may be paid to the administrator John Fox, to be disposed of by him in the ordinary course of administration.

The claim of Mrs. McRoberts was barred.

The order of ROSE, J., directed that the money in Court should be applied and paid out as follows: First, in payment to the claimants R. & J. Fox of the amount due to them under their assignment of their policy, to wit, \$1,428.72, and their costs of the motion before the Master and of the appeal; and that the balance of the moneys in Court should be paid out to John Fox as administrator.

From this order the claimants Trimble and Stevens appealed, and their appeal was heard by a Divisional Court composed of ARMOUR, C.J., and STREET, J., on the 7th June, 1899.

The same counsel argued the appeal and the same authorities were referred to.

June 23, 1899. The judgment of the Court was delivered by

Judgment.
Armour, C.J.

ARMOUR, C.J.:—

“ Now a debt *per se*, although a chattel and part of the personal estate which the probate confers authority to administer, has, of course, no absolute local existence ; but it has been long established in the courts of this country, and is a well-settled rule governing all questions as to which court can confer the required authority, that a debt does possess an attribute of locality, arising from and according to its nature, and the distinction drawn and well settled has been and is whether it is a debt by contract or a debt by specialty. In the former case, the debt being merely a chose in action—money to be recovered from the debtor and nothing more—could have no other local existence than the personal residence of the debtor, where the assets to satisfy it would presumably be, and it was held therefore to be *bona notabilia* within the area of the local jurisdiction within which he resided ; but this residence is of course of a changeable and fleeting nature, and depending upon the movements of the debtor, and inasmuch as a debt under seal or specialty had a species of corporeal existence by which its locality might be reduced to a certainty, and was a debt of a higher nature than one by contract, it was settled in very early days that such a debt was *bona notabilia* where it was ‘conspicuous,’ *i.e.*, within the jurisdiction within which the specialty was found at the time of death:” *Commissioner of Stamps v. Hope*, [1891] A. C. 476, 481.

The determination of the locality was, it will be observed, only for the purpose of determining the jurisdiction in which letters of administration were to be granted, and, although the locality of a specialty has been determined to be where it is conspicuous at the time of the death, that, in my opinion, means, where it is rightly conspicuous, and, as policy number 7935 had been assigned

Judgment. to R. & J. Fox, and they were entitled in law to the possession of it, it must be held to have been conspicuous, not where it actually was at the death, but where it rightly ought to have been at that time: *Mayo v. Equitable Life Assurance Society* (1893), 71 Miss. 590.

I think, also, that the rule as to the locality of a specialty governing the jurisdiction in which letters of administration are to be granted is subject to this qualification—if the specialty can be recovered and enforced in the country in which it is found at the death.

In Dicey's Conflict of Laws, at p. 318, it is laid down "that whilst lands, and generally, though not invariably, goods, must be held situate at the place where they at a given moment actually lie, debts, choses in action, and claims of any kind must be held situate where the debtor or other person against whom a claim exists resides; or, in other words, debts or choses in action are generally to be looked upon as situate in the country where they are properly recoverable or can be enforced."

Assuming, however, that letters of administration were properly granted by the County Court of the county of Crawford, in the State of Illinois, where the said policy numbered 7935 was actually found at the death, the said policy could not have been enforced and the moneys payable thereby recovered in the State of Illinois, for the Ontario Mutual Life Assurance Company, being as to that State a foreign corporation and not doing business therein, could not be sued in that State.

It was necessary, therefore, in order to the recovery of the moneys payable by the said policy and the enforcement thereof, that an administrator should be appointed in this Province, where the said company resides, and such administrator has been appointed, and the moneys payable by the policy having been paid into Court, this Court must either administer them or hand them over to such administrator to be administered.

American creditors of McRoberts cannot be prejudiced by this administration, for they will be entitled to file

their claims and rank equally with the Canadian creditors: Judgment.
Re Kløbe (1884), 28 Ch. D. 175; *Milne v. Moore* (1894), Armour, C.J.
24 O. R. 456.

As to the amount payable to the Foxes in respect of the assignment held by them of the said policies of insurance, I am of opinion that, according to the true construction of the agreement of the 21st July, 1897, they are only entitled to the amount of the first one of the promissory notes therein referred to, with interest thereon from the date of its maturity, and to the amount of the premiums paid by them since the date of the said agreement, with interest thereon from the respective times of payment thereof, and that the amount so made up should be paid to them out of the moneys in Court, and that the order of my brother Rose should be varied accordingly, and that the balance of the said moneys should be paid to John Fox as administrator, as aforesaid, to be by him administered according to law, and, with these variations of the order of my brother Rose, the appeal should be dismissed with costs.

E. B. B.

[DIVISIONAL COURT.]

ANNIE BENNER V. EDMONDS.

Libel—Privilege—Protection of Interests—Excessive Language—Evidence—Admissibility—Publication—Receipt of Letter—Further Publication—Non-direction—Damages.

The defendant received a letter from the solicitor of the plaintiff's mother complaining of statements circulated by the defendant which had caused the mother and her family, and particularly her daughter the plaintiff, annoyance, and threatening to begin an action for slander unless a retraction were signed and costs paid. This letter was not answered by the defendant, but the threatened action having been brought, the defendant wrote a letter to the plaintiff's mother, with the avowed purpose of preventing her from proceeding with her action. In that letter he referred to the plaintiff, and said he saw her drive her father out of the house and pelt him with sticks of wood, and asked the mother if she thought it would add to her daughter's character to have this and much more published in Court and in newspapers :—

Held, in an action for libel based upon this letter, that it did not come within the rule as to "statements necessary to protect the defendant's interests" so as to make the occasion privileged; and even if it did, the privilege was destroyed by the excess of the language.

Evidence was given by a woman who said that she saw the defendant's letter in the hands of the plaintiff's mother within twenty minutes after its receipt, and that she read it aloud in the presence of the plaintiff and her mother and several other persons. There was also evidence to shew that the letter had been posted and given out by the postmaster to the plaintiff's mother :—

Held, that had the evidence of the woman been offered in order to fix the defendant with liability for what was done as a further publication of the letter, it would not have been admissible, but it was admissible in order to prove publication by the defendant, which was denied, as it shewed that the letter was in the possession of the person to whom it was addressed shortly after it was posted by the defendant, and therefore was evidence of the receipt of it by her. It may not have been necessary to give the evidence, but the plaintiff had the right to do so.

Held, also, that it was not a ground for interfering with the verdict of the jury in favour of the plaintiff, that the trial Judge refused to tell the jury that the defendant was not responsible for the further publication of the letter made by the plaintiff or her mother, the jury not having been invited to increase the damages by reason of publication to others, and the damages awarded not being excessive.

Statement.

THIS was an action for libel and slander.

The alleged libel was contained in a letter written by the defendant to the plaintiff's mother on the 25th June, 1898, and the portions of it referring to the plaintiff which were complained of as defamatory of her were the following :—

“A word about Annie. Poor, tender-hearted, delicate, sensitive Annie. So kind to her father in life, and solicitous for his eternal welfare after death. Yet it is not so very long ago I saw myself this same Annie drive her father out of the house and then pelt him with sticks of stove wood. Do you think it would add to your daughter’s character to have this and much more published in Court and in the public newspapers? If you think so, go ahead with your suit, but, if you will take my advice, you will ‘let sleeping dogs lie.’”

The defendant by his statement of defence denied publication and that the words were libellous; and pleaded that the occasion of the publication of them, if they were published, was privileged, and that having been, as he alleged they were, published without malice, they constituted a privileged communication; and he also pleaded justification.

The plaintiff’s mother, to whom the letter was written, had instructed her solicitors, Messrs. Farmer & Farmer, to bring an action against the defendant for defamation, and Messrs. Farmer & Farmer, on the 13th June, 1898, wrote to the defendant informing him of this and enclosing a retraction which they required him to sign, and intimated that if it were not signed and their costs paid, the action would be brought.

In the opening sentence of their letter Messrs. Farmer & Farmer said: “Mrs. Jane Benner complains that you have been causing her and her family, and particularly her daughter Annie” (the plaintiff), “who is not in good health, a great deal of annoyance and worry by circulating statements,” etc.

The defendant, in order to support his claim that the occasion was privileged, set up that he was the leader of a Bible class in Woodburn, where the plaintiff and her mother resided, and that they had, previous to his writing the letter complained of, threatened to break up and mob his class, and that the mother, without justification or any ground whatever, had caused a writ to be issued against

Statement. him for slander, accusing him of having uttered statements in the pulpit respecting her deceased husband, of which he was entirely innocent, and claimed in the writ that these statements had injured the plaintiff's health (of which no evidence was, however, given); and that if the letter was written, which he denied, it was written to the mother in order to draw the attention of the plaintiff to the fact that it would be necessary for him in the litigation to lay the facts stated before the Court and jury, if the litigation should be proceeded with, and for the purpose of dissuading the plaintiff and her mother from going on with it.

The action was tried before FERGUSON, J., and a jury, at Hamilton, on the 14th October, 1898.

The jury found for the plaintiff as to the libel, and assessed her damages at \$350, and for the defendant as to the alleged slander, and judgment was thereupon directed to be entered in accordance with the findings of the jury.

The defendant moved to set aside the verdict and judgment for the plaintiff upon the claim for libel, and to dismiss the action, or, in the alternative, for a new trial, on the grounds: (1) that the trial Judge should have ruled that the occasion of the publication was privileged and dismissed the action, or have left the question of malice to the jury, and that he refused, though requested, to do so; (2) that there was no evidence of publication; (3) that evidence was improperly, and against the objection of the defendant's counsel, admitted of a publication by the plaintiff's mother; (4) that there was misdirection by the trial Judge in telling the jury that they might consider the alleged publication by the mother, and in refusing to tell them that it should not be considered in arriving at their verdict; and (5) that the damages were excessive.

The motion was heard by a Divisional Court composed of MEREDITH, C.J., and ROSE, J., on the 6th April, 1899.

Lynch-Staunton and *E. F. Lazier*, for the defendant, referred to *Wells v. Lindop* (1888), 15 A. R. 695; *Colvin*

v. *McKay* (1889), 17 O. R. 212; *Ross v. Bucke* (1892), 21 O. R. 692; *Gorst v. Barr* (1887), 13 O. R. 644; *Whitely v. Adams* (1863), 15 C. B. N. S. 392; *Jacob v. Lawrence* (1879), L. R. Ir. 4 C. L. 579; *Hanes v. Burnham* (1896), 23 A. R. 90.

Logie, for the plaintiff, cited *Folkard's Law of Slander and Libel*, 6th ed., p. 439; *Clegg v. Laffer* (1833), 10 Bing. 250.

July 7, 1899. MEREDITH, C. J.:—

There was, we think, beyond question, evidence of publication to go to the jury. The letter was admittedly written and mailed by the defendant addressed to the plaintiff's mother, and there was evidence that it was actually received by her, and that certainly sufficed.

The defendant's counsel sought to bring the case within the rule as to "statements necessary to protect the defendant's interests:" *Odgers's Law of Libel*, 3rd ed., p. 251.

I do not think the case is brought within the rule so as to make the occasion in this case privileged. The letter was not written in answer to the letter of Mrs. Benner's solicitors; that letter was not answered, but, the threatened action having been brought, the defendant wrote his letter not to the solicitors, but to Mrs. Benner herself, and with the avowed purpose of preventing her from proceeding with her action. The statements in it were not, I think, confined to the matter in hand, but in making them the defendant went out of his way to make a serious and, as the jury has found, unwarrantable charge against the plaintiff, who was not a party to the litigation, and the effect upon her of the statements which the defendant was charged with making had nothing to do with it. The defendant attempted to justify his reference to the plaintiff because the effect upon her of his alleged statements was complained of in the letter of the solicitors. I am not disposed to narrowly limit the scope of the rule which the defendant invokes; but in this case, so far from the letter

Judgment.
Meredith,
C.J.

being, in my opinion, an honest attempt by the defendant to defend his own interests in the references to the plaintiff, every line of it seems to me to be pregnant with malice, and, according to the finding of the jury on the defence of justification, the writing of it appears to have been an attempt on the defendant's part, by making a cruel and unfounded charge against the plaintiff, to deter her mother from proceeding with the action which she had brought against him for the vindication of the wrongs which she charged the defendant with having committed upon herself. Had the letter been written in reply to the solicitors' letter, something might have been said for the defence which is set up, though even then I doubt whether the occasion would have been privileged.

The circumstances seem to me to bring the case within the authority of *Fryer v. Kinnersley* (1863), 15 C. B. N. S. 422, where the plaintiff succeeded against the defence of privilege, though the jury had negatived malice, because, as the Court held, the expressions used in the communication in question there were so much in excess of the occasion as to prevent its being held that it fell within the rule as to privileged communications. The excess is in this far greater, I think, than it was in that case.

The evidence to the reception of which objection is taken is that of Jemima McEvoy, that she saw the defendant's letter in the hands of Mrs. Benner within twenty minutes after its receipt, and read it, and also read the parts of it referring to the plaintiff aloud in the presence of the plaintiff and her mother and several other persons.

Had this evidence been offered in order to fix the defendant with liability for what was done as a further publication of the letter, it would not have been admissible, but it was, I think, admissible in order to prove publication by the defendant, which was denied, as it shewed that the letter was in the possession of the person to whom it was addressed shortly after it was mailed by the defendant, and therefore was evidence of the receipt of it by her. It may not have been necessary to give that evidence in

addition to the evidence of the postmaster, but the plaintiff had a right to give it if she saw fit to do so. It must be remembered that the defendant did not confine himself to a formal denial of publication by him, but stoutly fought that issue, even to the extent of moving at the close of the plaintiff's case to dismiss the action because, as his counsel contended, publication was not proved. It was, judging from what was said by my learned brother, in this view, I think, that the evidence was admitted. It is true that when Mr. Staunton objected that the jury should have been told that the defendant was not responsible for any publication made by the plaintiff or her mother, my learned brother said he should tell them the exact opposite of that, but he did not tell them so, and that was not said in the hearing of the jury. This objection, therefore, at the most, amounts to one of nondirection and affords, I think, no ground for our interfering with the verdict of the jury, as the verdict was not against the evidence or the damages excessive.

Judgment.
Meredith,
C.J.

The motion should, in my opinion, be dismissed with costs.

ROSE, J.:—

I agree that there was no substantial error in the charge of the learned Judge as to the question of qualified privilege.

Assuming that the reference to the daughter was so connected with the matter in dispute between the defendant and her mother as to justify it, there was such an excess as I think afforded evidence of express malice, and so the case could not have been withdrawn from the jury, and I do not think the direction of the learned Judge to the jury, as to the law governing qualified privilege and express malice, could have misled them to the defendant's injury. The law is clearly laid down in Folkard's Law of Slander and Libel, 6th ed., pp. 322-23, where it is said: "And therefore where there is an apparent excess beyond

Judgment.

Rose, J.

the privilege, the plaintiff is justified in requesting the Judge to leave the question to the jury as to whether the alleged excess does not shew malice, so as to deprive the defendant of the protection which the occasion affords him." And the case of *Cooke v. Wildes* (1855), 5 E. & B. 328, is referred to, where "it was held that the occasion of writing the letter was privileged; but that there was evidence from the concluding part of it, of express malice, which ought to have been left for the jury: and that, therefore, the Judge could neither nonsuit nor direct a verdict for the defendant."

I do not think the defendant could reasonably complain if there had been a direction to the jury that the part of the letter referring to the plaintiff in this action was not privileged, that it was not necessary for the purpose for which he was writing to the mother; and so, to the extent that the learned Judge left the question of qualified privilege and excess to the jury, it was favourable to the defendant.

The law is laid down in the work to which I have referred, at p. 313, as follows: "If the communication contain several distinct statements, some of which are privileged, and others not, those which are privileged do not shelter those which are not so."

The learned Judge at the trial, no doubt, told the jury, in effect, that in his opinion the statement referring to the plaintiff was not privileged, but he did not formally withdraw the question from the jury, and in substance correctly laid down the law that excess destroyed the privilege.

In my opinion, this ground of objection fails.

As to the publication, I quite agree that there was ample evidence of publication. Indeed, as I understood Mr. Lynch-Staunton on the argument, he did not very stoutly contest this point, although he did not give it up.

I have had some difficulty with the objection that the learned Judge should have withdrawn from the jury the consideration of the effect of others having heard the letter read to them by the mother or by others. But I do not

find that anywhere in the charge the jury had their minds directed to the publication to others as affecting the question of damages, or that they were invited to increase the damages by reason of publication to others. The direction given to them as to damages is not and could not well be complained of. The only reference made by the learned Judge in his charge to the letter having been seen or read by others was as follows. Dealing with the question of publication, the learned Judge said: "Here the evidence shews that the paper was posted in the post office, given to the acting postmaster, and it was given out by him to the person to whom it was addressed, and that it was read in the presence of other people, so that I should think you would have no difficulty whatever about the publication." I do not know why the learned Judge referred to the fact that it was read in the presence of other people, except for the purpose of identification, but certainly it was not with reference to the question of damages.

Judgment.

Rose, J.

I do not think the damages were excessive, nor that the result reached can fairly be complained of. The defendant's conduct was without excuse, unless he could prove his plea of justification, and even then it might be open to observation.

I think the motion must be dismissed with costs.

E. B. B.

HIGGINS V. TRUSTS CORPORATION OF ONTARIO ET AL.

Mortgage—Purchaser of Equity of Redemption—Indemnity—Death of Mortgagor—Insolvent Estate—Administrator—Release.

Where the mortgagor is dead and his estate is insolvent, the mortgagee cannot compel the administrator of the estate to seek indemnity from one who purchased the mortgaged estate from the mortgagor subject to the mortgage, nor is the administrator responsible in damages to the mortgagee for having released the purchaser from liability.

Statement.

AN appeal by the plaintiff from the report of Mr. J. S. Cartwright, an official referee.

One R. P. Echlin, in March, 1890, made a mortgage to the plaintiff for \$1,150 over certain lands in the city of Toronto, and a week later conveyed the same lands to the defendant Hodgins, "subject to" the plaintiff's mortgage, in exchange for other lands. Echlin died in March, 1891, and the defendants the Trusts Corporation of Ontario were in April, 1891, appointed by a Surrogate Court administrators of his estate, which was insolvent. By an instrument dated the 18th October, 1894, these defendants, as administrators, released the defendant Hodgins from liability to pay the plaintiff's mortgage.

This action was brought upon the plaintiff's mortgage for foreclosure and payment, and the plaintiff sought to recover the full amount of his mortgage money from the defendants the Trusts Corporation of Ontario, as damages for having released the defendant Hodgins.

The referee found and reported that these defendants were not liable upon that claim, and from such finding and report the plaintiff now appealed.

The appeal was heard by BOYD, C., in Court, on the 22nd June, 1899.

R. U. Macpherson and G. C. Campbell, for the plaintiff. The transaction between Echlin and Hodgins made the latter liable to the former: *Boyd v. Johnston* (1890), 19

O. R. 598; *British Canadian Loan Co. v. Tear* (1893), 23 O. R. 664; *Campbell v. Morrison* (1897), 24 A. R. 224, 28 S. C. R. 228 (*sub nom. Maloney v. Campbell*); *Fraser v. Fairbanks* (1894), 23 S. C. R. 79. The benefit of such liability passed to the administrators: *Carr v. Roberts* (1833), 5 B. & Ad. 78. [BOYD, C.—Was Echlin bound to call on Hodgins to indemnify him?] No; but Echlin died, and his administrators are not in the same position; they must call in anything outstanding in favour of the estate. The creditors are *cestuis que trust*: *Carr v. Roberts*, *supra*; followed in *Ashdown v. Ingamells* (1880), 5 Ex. D. 280; see also *Re Perkins*, [1898] 2 Ch. 182; *Cruse v. Paine* (1868), L. R. 6 Eq. 641. [BOYD, C.—The creditors, other than the plaintiff, are not represented here.] There are cases which shew what is negligence or devastavit on the part of administrators. [BOYD, C.—You need not go into that.] There was no power in the administrators to give a release: *Re Clay and Tetley* (1880), 16 Ch. D. 3. [BOYD, C.—It does not turn upon that.] The administrators are trustees of the assets and liable for breach: Williams on Executors, 9th ed., pp. 1691, 1876-8, 1916; *Re Baker* (1881), 20 Ch. D. 230; *Re Birch* (1884), 27 Ch. D. 622; *Re Brogden* (1888), 38 Ch. D. 546; *Re Stevens*, [1898] 1 Ch. 162; *McCargar v. McKinnon* (1868), 15 Gr. 361, (1870) 17 Gr. 525. As to when the right to indemnity arises, see *Boyd v. Robinson* (1891), 20 O. R. 404; *Sutherland v. Webster* (1894), 21 A. R. at p. 239; *Campbell v. Morrison* (1897), 24 A. R. at p. 229; *Maloney v. Campbell* (1897), 28 S. C. R. 228; *Smith v. Pears* (1897), 24 A. R. 82, at pp. 86-7; *Wooldridge v. Norris* (1868), L. R. 6 Eq. 410; *Lacey v. Hill* (1874), L. R. 18 Eq. at p. 191; *Loosemore v. Radford* (1842), 9 M. & W. 657. It is said that the plaintiff has no right, because he did not prove his claim with the administrators: 59 Vict. ch. 22 (O.). An advertisement for creditors was issued, but there was no distribution of assets, and therefore no protection, and this would not justify giving the release. The statute was not passed until 1896, and Echlin died in 1891.

Argument.

J. H. Moss, for the defendants the Trusts Corporation of Ontario. The corporation as administrators advertised for creditors, but heard nothing of the plaintiff's claim and knew nothing of his mortgage until the defendant Hodgins came and asked for a release, which was granted. The conveyance to Hodgins was upon an exchange of lands, and the deed was not executed by him. The same liability does not arise as upon a purchase: *Walker v. Dickson* (1892), 20 A. R. 96. Echlin's death can make no difference in the rights of the plaintiff, who is simply a creditor; he cannot, as such, shew that the estate has been diminished by the release given by the administrators, and there is no deficiency *quoad* the body of creditors.

Macpherson, in reply, cited *Ball v. Tennant* (1894), 21 A. R. 602.

July 6, 1899. BOYD, C.:—

The plaintiff, the mortgagee, refused to value his security and claim for the unsecured residue on the general assets of the Echlin estate being administered by Echlin's administrators, the defendants. Therefore, it is a case in which no part of the general assets has gone to him or been diverted from the other creditors. The estate is almost utterly insolvent, but a few cents being available on the dollar for the benefit of creditors. The mortgagee now seeks to recover the whole of his mortgage debt against the administrators, on the ground that they, the defendants, have released from liability one Hodgins, who acquired the equity of redemption of the land from Echlin subject to this mortgage. It is said that Hodgins was able to pay and was bound to exonerate Echlin and his estate from the payment of the mortgage, and that now, after Echlin's death, his personal representatives were in duty bound to get in this asset, so that, through the mortgagor's right of action against Hodgins, the plaintiff might be paid; and that they, by releasing this liability, have rendered themselves personally responsible to the plaintiff as a creditor.

When a mortgagor sells or transfers his equity of redemption subject to the mortgage, it means that the purchaser or transferee agrees to pay the mortgage or to indemnify the mortgagor from its personal incidence upon him.

Judgment.
Boyd, C.

While the mortgagor lives, and the mortgage is due and unpaid, he can either pay it himself and call on his assignee to recoup him, or he can, before paying, call upon the assignee to make payment to the mortgagee, and so be effectually protected.

What difference results from the death of the mortgagor? There appears to be no difference in the case of a solvent estate. But if the estate is insolvent, and the personal representative of the mortgagor has not wherewith to pay the mortgage, he is not obliged to do anything. He may, if he chooses, sue the assignee of the mortgaged estate upon the implied indemnity, and so require the money to be paid directly to the mortgagee. For the money would not go into the hands of the personal representative for the benefit of creditors generally, leaving the mortgage debt unpaid; its only appropriate destination is into the hands of the mortgagee so as to exonerate the estate in the hands of the assignee, who is thus called upon to make the payment.

In the case of a *solvent* estate, where the personal representative of the mortgagor has paid the mortgage, it is his duty, in due course of administration, to require payment by way of indemnity from the purchaser of the equity of redemption; but this money, when received, would be available for all creditors of the mortgagor's estate. And so, in the case of a solvent mortgagor, it would be the duty of his personal representative to call on the assignee to protect the assets in his hands from being applied to pay the mortgage debt, for which the assignee, as between those two, is primarily liable.

The element of difference is not, therefore, the fact of death, but that of insolvency. The assignee cannot be sued directly (in the case given) by the mortgagee or his

Judgment.

Boyd, C.

personal representative; the only direct action is by the mortgagor, with whom the assignee of the estate is in privity. Now, in the present case, where the estate of the mortgagor is insolvent, if the Trusts Corporation, his administrators, were required by the Court to get in the moneys due, on the personal undertaking of Hodgins to indemnify the intestate, for the purpose of having that sum go direct to the mortgagee, it would be accomplishing indirectly what could not be done directly by the mortgagee, under guise of the altered conditions arising from the death of Echlin. It is optional with the mortgagor, living, to sue or not to sue the assignee—that is conceded. It is equally optional, in my opinion, in the case of his executor or administrator. The necessity arises for the executor or administrator to collect from the assignee, when the money so to be obtained will become general assets in his hands. But when the destination of the money is by way of specific payment to the mortgagee, then the Court will not in administration proceedings direct such a step, which is foreign to the purpose of an administration of the estate.

Affirm the report.

E. B. B.

[DIVISIONAL COURT.]

EVES V. BOOTH.

Dower—Husband and Wife—Separation Deed—Trustees—Covenant as to Release of Dower—Construction of.

In 1868 the plaintiff and her husband and trustees on her behalf executed a deed which contained an agreement for separation of the husband and wife, the conveyance of certain property by the husband for the benefit of the wife, and a number of covenants, one of which was as follows :—"And the parties of the third part"—the trustees—"hereby covenant that the said Jane Eves"—the plaintiff—"will, whenever called upon, release her dower in any lands of which he, the said James Eves"—the husband—"may hereinafter (*sic*) acquire a title." The other covenants were expressed to be with the heirs, executors, and administrators of the husband.

In an action by the plaintiff against the executrix of her husband's will, for dower in his after-acquired lands :—

Held, that this covenant was a part of the consideration for the benefits the plaintiff received under the deed, and which she had ever since continued to enjoy, and, although she did not personally covenant, yet, as the covenant was entered into by her trustees on her behalf, and she was a party to and executed the deed containing it, she was bound by her recognition of and assent to it, and it would be contrary to equity to permit her to maintain the action.

THIS was an action by Jane Eves, the widow of James Eves, against the executrix of the will of the latter, for dower and damages for detention of dower. Statement.

The defendant did not deny that James Eves died seized of the lands out of which dower was claimed, nor that the plaintiff was his lawful widow, but set up as a defence that the right to dower was barred by a certain deed of the 24th July, 1868.

The deed was made between James Eves, of the first part, his wife (the plaintiff), of the second part, and H. W. Bilton, E. S. Bilton, and Joseph Bilton, trustees, of the third part.

It recited that certain disputes had arisen between the husband and wife, and the latter had begun a suit for alimony, and it had been agreed between the husband and wife that from and after the date of the deed they were not to live together as man and wife, and that certain agreements had been made with regard to property, etc.,

Statement. and the plaintiff had agreed to abandon her suit for alimony.

It then witnessed that in pursuance of the agreements, in consideration of the premises, etc., and of one dollar, the husband granted to the trustees certain lands (describing them) upon trust to allow the wife the rents and profits for her life for her own benefit and to maintain her infant children, and upon her death to sell the lands and divide the proceeds among the children.

Then followed covenants by the trustees, each of which was separately expressed to be for themselves and their respective executors and administrators, with the husband, his heirs, executors, and administrators, to maintain the wife and her children and indemnify the husband against debts of the wife; that the wife should not molest the husband; and other like covenants.

And then came the following covenant: "And the parties of the third part hereby covenant that the said Jane Eves will, whenever called upon, release her dower in any lands of which he, the said James Eves, may hereinafter (*sic*) acquire a title."

This was the covenant relied on as a defence. After it followed the words:

"And in consideration of the premises, he, the said James Eves, for himself, his heirs, executors, administrators, and assigns, doth hereby covenant," etc.

The plaintiff had taken advantage of the provision made for her by the deed, and had enjoyed the benefit of it for thirty years.

The defendant also counterclaimed for indemnity against the plaintiff and Joseph Bilton, the surviving trustee under the deed.

The action was tried by BOYD, C., at Toronto, on the 28th February, 1899.

George Wilkie, for the plaintiff.

A. Hoskin, Q.C., for the defendant.

J. E. Irving, for Joseph Bilton.

March 6, 1899. BOYD, C.:—

Judgment.

Boyd, C.

The separation deed does not profess to provide for a bar of dower directly by the wife, nor is it framed so as to put her to an election. Neither does it contemplate that her dower exists, and make provision for indemnification in case dower is claimed by and assigned to her. The only direct stipulation material to be regarded runs, very vaguely and almost carelessly, thus:

“The parties of the third part hereby covenant that the said Jane Eves will, whenever called upon, release her dower in any lands of which he, the said James Eves, may hereinafter (*sic*) acquire a title.”

Now, on the one hand it is urged that this is to be regarded as a personal or individual covenant with the husband, and that it is to be read as exactable only during his life and upon his request, and therefore that it does not extend to any lands of which he dies seized—if there was prior request from him to have the dower therein released.

True it is that the covenantees are by name or reference omitted, and that the prior and after covenants are expressed to be between the respective parties and their representatives; but by this short method of expression it may be understood that the parties are bound, that is to say, such parties as appear to be intended to be bound; in this case, the trustees and their executors and administrators, etc., to the husband, his executors, etc.: *Ramsden v. Smith* (1854), 2 Drew. 298, 307.

True, also, that there are cases which shew that the general expression “whenever called upon” may be restricted to the life of a given person, as in *Carter v. Carter* (1869), L. R. 8 Eq. 556; but there must be some more persuasive context or some more controlling circumstances than we have in this case.

And again, the construction, if the case is doubtful, must be against the trustees who covenant, rather than in their favour: *Warde v. Warde* (1852), 16 Beav. 103.

Judgment.

Boyd, C.

The words of the covenant are of large and general import, providing for release of dower, which may be whether it is inchoate or consummate, and may be to the terre-tenant during the husband's life or after his death. And the engagement is, that this the said Jane Eves will do "whenever called upon"—there being no limitation of time expressed or implied.

That was the plan of the separation: the husband engaged to give so much in land and money, which was to be for the life of the wife, and she, among other things, by the trustees, engaged that he should enjoy his after-acquired land free of her dower. It is admitted that, apart from the land conveyed to her trustees, he had then no other real estate.

In the result, then, the widow is entitled to have dower assigned, with costs of action, and the estate of the husband is entitled to be indemnified against this outlay by the surviving trustee.

I have not dealt with the question of procedure as to whether the trustee has been rightly brought into this action, as I understood the parties wished the merits determined.

In the result, it will be better, I should say, not to claim dower, and save the trustee from making it and the costs good.

If the parties so settle, it appears to me a case proper to direct costs of all out of the estate.

No settlement having been come to :

April 25, 1899. BOYD, C.:—

The trustees' covenant that Jane Eves will release dower in after-acquired lands has been broken ; she has sued, and recovered her dower. The surviving trustee is liable to make good to the executors of the testator the amount of the value of the dower so claimed and obtained. That is the measure of damages upon the covenant. It should not

extend to the costs of the action for dower, for that, as against the trustee, should not have been defended. Judgment.

Boyd, C.

The defendant Bilton, by his defence to the counterclaim, puts himself upon the true construction of the agreement of the 24th July, 1868, and raises no objection as to being made a party in the counterclaim. He should pay the plaintiff's costs of counterclaim as far as he, the trustee, is concerned.

I do not consider the matter of practice raised as to the propriety of making Bilton a party by counterclaim, because that should have been taken at the outset, and should have been raised on the record, and not brought in at the close of the litigation.

The defendant appealed from the judgment of the Chancellor; the plaintiff also appealed, because damages for detention of dower were not allowed; and Bilton, the defendant to the counterclaim, also appealed.

The appeals were heard by a Divisional Court composed of ARMOUR, C.J., and STREET, J., on the 8th June, 1899.

A. Hoskin, Q.C., for the defendant. The covenant is not artistically drawn, but the Court will look at the whole contract: Elphinstone on the Interpretation of Deeds, Rule 151. Such an agreement as this is binding on all the parties to it: *McArthur v. Webb* (1871), 21 C. P. 358; *Marshall v. Marshall* (1879), 5 P. D. 19; *Toronto General Trusts Co. v. Quin* (1894), 25 O. R. 50; *Estcourt v. Estcourt* (1760), 1 Cox Eq. 20; *Hunt v. Hunt* (1861), 4 DeG. F. & J. at p. 230; *Jee v. Thurlow* (1824), 2 B. & C. 547; *Clark v. Clark* (1885), 10 P. D. 188, 194; *Fearon v. Aylesford* (1884), 14 Q. B. D. at p. 798; *Williams v. Baily* (1861), L. R. 2 Eq. at p. 734. The land out of which dower is now sought was after-acquired property. It is said that, because the executor was not named in the covenant, it died with the testator, but it is not in terms limited to the testator's lifetime: see Williams on Executors, 9th ed., p. 695. After this covenant, in the deed,

Argument. follow the words "in consideration of the premises," which shew that this covenant was a part of the consideration for the benefits she obtained: *Thuresson v. Thuresson* (1899), 30 O. R. at p. 512; Stroud's Judicial Dictionary, p. 610. If the covenant is not the wife's, she is bound to elect between what her husband gave her and her dower: *Parham v. Parham* (1845), 25 Tenn. 286; *Lively v. Paschal* (1866), 35 Ga. 218.

George Wilkie, for the plaintiff. The language of the covenant contemplates that dower should exist and that the plaintiff should join in barring dower during her husband's lifetime. This covenant does not extend to executors, while all other covenants in the deed do. There was an option in James Eves to call or not to call upon his wife to bar dower, and such an option does not descend to executors: *In re Cousins* (1885), 30 Ch. D. 203. Even if this were a covenant by the wife, it would not be effective, as in 1868 the ability of a married woman to contract did not extend so far: Scribner on Dower, 2nd ed., vol. 2, p. 309; Cameron on Dower, p. 408; *Guidet v. Brown* (1877), 3 Abb. N. C. 295. In order to bar dower there are certain formalities required by law: *Cahill v. Cahill* (1883), 8 App. Cas. 420. The plaintiff, if entitled to dower, is also entitled to damages for detention.

J. E. Irving, for Joseph Bilton.

Hoskin, in reply.

June 17, 1899. The judgment of the Court was delivered by

ARMOUR, C.J.:—

I think it quite plain that this action is not maintainable by the plaintiff.

She was a party to and executed the deed of separation, which contained this covenant by her trustees, who were parties to and executed the deed, "that the said Jane Eves will, whenever called upon, release her dower in any lands

of which he, the said James Eves, may hereafter acquire a Judgment.
title.”

Armour, C.J.

This covenant was a part of the consideration for the benefits she received under the deed, and which she has ever since continued to enjoy, and, although she did not personally covenant, the covenant was entered into by her trustees on her behalf, and she was a party to and executed the deed containing it, and is bound by her recognition of and assent to it, and it would be contrary to the principles upon which Courts of equity have always acted to permit her, under these circumstances, to maintain this action: *Estcourt v. Estcourt* (1760), 1 Cox Eq. 20; *Hunt v. Hunt* (1861), 4 DeG. F. & J. 221; *Marshall v. Marshall* (1879), 5 P. D. 19; *Clark v. Clark* (1885), 10 P. D. 188.

The covenant is in effect a covenant that she will never claim dower in the after-acquired lands of her husband, James Eves.

The defendant's appeal will, therefore, be allowed with costs and the action dismissed with costs, and the counter-claim will be dismissed without costs, and the plaintiff's and Bilton's appeals dismissed with costs.

E. B. B.

[DIVISIONAL COURT.]

BONN V. THE BELL TELEPHONE COMPANY.

Telephone—Poles on Street—Supervision of Municipality—Interference with Public Travel—Liability.

A telephone company having permission by its Act of incorporation to erect poles on the streets of towns and incorporated villages, so as not to interfere with the public right of travel, is not relieved from liability for damages when it plants the poles on the highway in such a way as to become an element of danger to the public, although, as required by the Act of incorporation, the poles are planted under the supervision of the municipality.

Statement. THIS was an action tried before STREET, J., and a jury, at Chatham, on the 15th November, 1898.

The action was brought by Michael Bonn, Clarrissa Bonn, and William Meade, against the defendants, the Bell Telephone Company, to recover damages alleged to have been sustained by the plaintiffs through the negligence of the defendants.

The plaintiff Clarrissa Bonn, was being driven by the plaintiff William Meade, from the village of Dresden to the village of Wallaceburg, and just after they had entered Wallaceburg and were driving along King street, a dog ran out into the street, flew at the horse, barked at him, and bit him on the leg, whereupon the horse ran away, and the hind wheel of the buggy struck a telephone pole, and these two plaintiffs were thrown out, and severely injured. When the horse first started off the female plaintiff seized hold of the reins, which the defendants claimed prevented the plaintiff Meade from keeping control of the horses. The plaintiff Meade denied it had any such effect, for he said on his telling her to let go, she did so at once.

On one side of the street in question, and on that part usually used for travel, there was a railway track laid, being a branch of the Huron and Erie railway, which reduced the travelled part of the street to twenty-one feet. Some

years back a telegraph line, for the use of the railway, had been erected by the railway company. Subsequently the telephone company introduced their system and procured the consent of the railway to permit them to use the poles of the telegraph line, and to string a wire on them. This was done, and the wire was used by both companies, but the telephone company having charge of and keeping the poles and wires in repair. Statement.

In October, 1897, the telephone company desired to renew the poles, and they notified the mayor by letter that it was intended to replace the poles, and asked to have some one appointed on behalf of the council to attend to their location. This letter was handed by the mayor to the clerk of the council, who brought it before the latter, when it was referred to the fire and light committee, and, according to the evidence of the street commissioner, he was instructed by the committee to see that the poles did not interfere with a tile drain laid down; and there was contradictory evidence as to whether the commissioner took part in the location of the pole. On the side of the street where the pole was, there were some trees, and to avoid the branches the pole was placed on the side of the ditch on which the travelled road was.

The learned Judge left the following questions to the jury, which, with their answers, were as follows:

1. Did the telephone company put this pole in a place and in a position so as to materially interfere with the use of that part of the highway by the public. Answer. We consider that the pole in question does materially interfere with the public right of travel on said street, and, considering the nearness of the railroad, we think it dangerous in its present position.

2. Was the location of the pole made under the direction of an officer appointed by the council for the purpose. Answer. It was.

3. Had the horse ceased to be under the control of the driver at the time of the accident by reason of the woman pulling the lines. Answer. No.

Statement.

4. Was Mrs. Bonn's act in seizing the lines an unreasonable act under the circumstances. Answer. No.

And they assessed the damages as follows: \$200 to the plaintiff Meade, \$125 to the plaintiff Clarrissa Bonn, but no damages to the plaintiff Michael Bonn.

Upon these findings the learned Judge entered judgment for the plaintiffs William Meade and Clarrissa Bonn, but for the defendants as regarded the plaintiff Michael Bonn.

From this judgment the defendants appealed asking to have the judgment entered in their favour as against the plaintiffs Meade and Clarrissa Bonn.

On March 16th, 1899, before a Divisional Court composed of BOYD, C., and ROBERTSON, J., *Matthew Wilson*, Q. C., supported the appeal. The learned Judge at the trial seemed to think he was bound by the case of *Atkinson v. City of Chatham* (1898), 29 O. R. 518. That case, however, does not apply. There the poles were not put in where the town officer located them, while here the pole was placed in the exact spot fixed upon by the town officer. There are two grounds raised by the defence: first, that this was not a telephone, but a telegraph pole, the poles having been erected under an arrangement with the Erie and Huron Railway Company, the tracks of which, and the telegraph line, having been laid down on the street under the authority conferred for that purpose by the statutes and the by-laws of the municipality, the telephone company being merely authorized to use it under an agreement made with the railway company. The second ground is, assuming the line to be a telephone line, and the pole in question a telephone pole, it was lawfully located on the street. Under the Act incorporating the Bell Telephone Company, 43 Vict. (1880), ch. 67, sec. 3 (D.), the company is empowered to construct, erect and maintain its line or lines of telephone along the street provided it does not interfere with the public right of travel. Therefore all the company had to provide against was the non-interference with the public right of

travel. This section was amended by 45 Vict. (1882) ch. 95, sec. 2 (D.), which required that the location of the line should be under the direction or supervision of the engineer or other officer as the municipal council might appoint; and this has been followed in the Ontario legislation: Municipal Act, R. S. O. ch. 223, sec. 554, sub-sec. 4. The amendment, therefore, provides for the poles being located under the authority of the municipal officer and where this is done the company are freed from all liability. In any event no negligence is shewn. He referred to *Macdonald v. Corporation of Yarmouth* (1897), 29 O. R. 259; *Commonwealth v. City of Boston* (1867), 97 Mass. 555; Dillon on Municipal Corporations, 4th ed., sec. 698, p. 829; *Roberts v. Wisconsin Telephone Co.* (1890), 77 Wis. R. 589; *Allan v. Atlantic and Pacific Telegraph Co.* (1880), 21 Hun 21-2; Keasbey on Electric Wires, pp. 46-49, 157-161; *Walton v. Corporation of York* (1881), 6 A. R. 181; *Soule v. Grand Trunk R. W. Co.* (1871), 21 C. P. 308; Croswell on Electric Wires, secs. 248-258; *Sheffield v. Central Union Telephone Co.* (1888), 36 Fed. Rep. 164. The action should have been brought against the municipality and not against the telephone company. The street is vested in the municipality and it is liable for want of repair, and an action must be brought against it: Municipal Act, secs. 601-606, 612.

J. S. Fraser, contra. Assuming that the power to construct the railway authorized the erection of a telegraph line as part of the railway system, the statute must be read strictly, and, therefore, would only apply to a telegraph line and not to a telephone line, erected by the Bell Telephone Company, which is a purely commercial enterprise. The line must be treated as that of the telephone company, and it is, therefore, liable for the damages sustained by the plaintiffs. It is quite clear that the pole must be placed so as not to interfere with the public right of travel, and the fact of legislation requiring the location of the pole under municipal authority does not restrict the liability of the company. If it had

Argument. been intended to relieve the company from liability, the statute would have expressly said so. The amendment was passed only as a further precaution. The council, however, never directed where the pole should be placed. No by-law or resolution was passed authorizing any officer to settle the location of it. The whole authority conferred by the street and light committee was to go and see that it did not interfere with the tile drain. The learned Judge properly held that he was governed by *Atkinson v. Corporation of Chatham* (1898), 29 O. R. 518. He referred to *Re Bernina* (2) (1887), 12 P. D. 58, 61; *Mills v. Armstrong* (1888), 13 App. Cas. 1, 9; *Keasbey on Electric Wires*, 47, 155-58; *Adams v. Glasgow and South-Western R. W. Co.* (1875), 3 Court Sess. Cas., 4th ser., 215; *Sheldon v. Western Union Telegraph Co.* (1889), 51 Hun 591, affirmed 121 N. Y. 697.

May 4th, 1899. The judgment of the Court was delivered by

BOYD, C.:—

The Bell Telephone Company was incorporated by Act of Canada, 43 Vict. ch. 67 (1880); and by section 3, the "company may construct, erect and maintain its line or lines of telephone along the sides of * * any public highways, streets, * * or other such places, * * provided the company shall not interfere with the public right of travelling on, or using such highways, streets, * * provided that in cities, towns, and incorporated villages (the location of the line and), the opening up of the street for the erection of poles, shall be made under the direction and supervision of the engineer or such other officer as the council may appoint, and in such manner as the council may direct." The words in brackets are incorporated in section 3, being amended as directed in 45 Vict. ch. 95, sec. 2 (D.).

In this case in the then incorporated village of Wallace-

burg, the jury find that the location of the pole in question was made under the direction of an officer appointed by the council for the purpose. The jury also find as follows: "We consider that the pole in question does materially interfere with the public right of travelling on the street, and, considering the nearness of railroad, think it dangerous in its present condition."

Judgment.

Boyd, C.

The railroad referred to by the jury is a branch of the Erie and Huron, which is authorized to be constructed to the village of Wallaceburg by 41 Vict. ch. 45, sec. 2 (O.) (1878). By 45 Vict. ch. 49, sec. 2 (O.), the said railway was enabled to make their road and lay their rails along any of the highways in any municipality after obtaining a by-law for that purpose. And by section 7 of that Act, the railways might construct and operate a telegraph line or lines in connection with their railway, and all the privileges conferred upon telegraph companies by the various statutes in that behalf are thereby conferred upon the railway company (1882).

It was said in argument that this Erie and Huron road had power under the Dominion Railway Act, 51 Vict. ch. 29, sec. 90 (m), to "construct or acquire electric telegraph and telephone lines for the purposes of its undertaking"; but I do not find that such power is given by any statute cited. The first Act of incorporation, 36 Vict. ch. 70 (O.), only gives them power under the Consolidated Railway Act of Canada at a period anterior to the discovery of the telephone process.

The general Act relating to telephone companies enables them, after obtaining proper concessions from lawful authorities, to carry their line along and upon any public road and highway by erection of the necessary posts, etc., provided the same are not so constructed as to incommode the public use of such road or highway: R. S. O. (1877) ch. 151. It appears to me that so far as any right is derived by the telephone company from the railway company, as to the use of the poles and line of wire (common to both), no valid defence arises upon the findings of the jury.

Judgment.

Boyd, C.

There is no proved designation of place on the street where the posts of the railway company are to be planted, and while the right to use the street for the poles exists, there is no implied immunity if the poles are placed so as to be dangerous to the public use of the highway.

I have from this aspect of the case to consider the other point which was more strenuously argued, viz., that the action of the municipal authorities at Wallaceburg in supervising and directing the place on the street where the pole was planted legalized the act so that it cannot be made unlawful or declared to be a nuisance by the verdict of a jury, so far as the telephone company is concerned.

The condition of affairs was strongly argued by the defendants' counsel thus: The telephone company have the right to plant poles along the side of any highway. In incorporated villages, the particular spot is to be located by the municipal authorities through their officer appointed for the purpose. This being done the company is shut down to that very spot and must plant their poles there and nowhere else. The pole so erected is lawfully there, and cannot become unlawful because a runaway horse rushes against it. In this instance the pole was placed on the slope of a hollow ditch or watercourse at the side of the road and was well off the usual travelled part of the road. There is a space of twenty-one feet between the track and the pole, and the latter is fourteen feet from the side of the street.

All these matters, however, were submitted to the jury under the Judge's direction, which is not complained of.

The liability of the telephone company turns on the proper construction of the original statute 43 Vict. ch. 67, sec. 3 (O.). The company has not an absolute right to use the highways. It is only a permission—they may construct provided that it shall not interfere with the public right of travelling on or using the highways. That is a general and all controlling provision which has a paramount place as to the use of all highways. Superadded is a provision when the company seeks to

go through towns and incorporated villages, the streets of which are suffered to be subject to more and more varied easements and uses, than the roads in rural districts. In these more crowded highways the choice of location is supervised or controlled by the action of the municipal authorities—the location of the line and the opening up of the street for the erection of poles shall be done under the direction and supervision of the engineer or other officer in that behalf appointed by the council. That further safeguard, however, does not nullify the provision placed first in the statute that the company is not to interfere with the public right of travel. The company does not acquire absolute rights on the street because the locality of the line has been determined under the direction of the civic or municipal officer.

Judgment.

Boyd, C.

It is still open for inquiry as to whether the public user has been interfered with—and by that I mean appreciably interfered with—interfered with so as to render the way in some sense dangerous to travel. Theoretically, there is some interference with the public right in the highway wherein the poles may be placed even though close along either side. In every case of accident, where injury has been caused by the poles, the question will arise as to whether there has been any undue interference with the free use of the road.

This question is not foreclosed, in my opinion, as to cities, towns and villages, because the poles have been planted under municipal direction. It is for the forum of trial—whether before Judge or jury—to determine whether the poles, situated as they are, unreasonably interfere with the free use of the highways so as to become an element of danger to the public.

According to our law based on that of England, the telephone company has no right to use the streets without legislative sanction either directly or indirectly through the action of properly authorized municipal bodies: *Regina v. United Kingdom Electric Telegraph Co.* (1862), 31 L. J. M. C. 166, S. C. (1862), 9 Cox C. C. 174; and the right of the public is to have the whole width of the road pre-

Judgment. served free from obstructions, and it is not confined to
Boyd, C. that part which is used or the *via trita*: *Turner v. Ringwood Highway Board* (1870), L. R. 9 Eq. 418, 422. So that the effect of Canadian Legislation is to legalize the obstruction created by the poles so far that they cannot be abated or complained of as a public nuisance: *Sherbrooke Telephone Association v. Corporation of Sherbrooke* (1890), Montreal L. R. 6 Q. B. 100; but it still leaves open the question whether the company may not suffer in damages for particular injury to a traveller, if the obstruction is found to be dangerous: see *People v. Metropolitan Telephone Co.* (1884), 31 Hun 596.

Such seems to be the present case. The jury have found that the public right is sensibly interfered with by the location of the pole, and that it forms a place of danger owing to the proximity to the railway track which laterally encroaches on a great part of the street.

This decision is in accord with *Atkinson v. City of Chatham* (1898), 29 O. R. 518, and with some American authorities such as *Wolfe v. Erie Telegraph and Telephone Co.* (1887), 33 Fed. R. 320, though it is at variance with rulings in the Massachusetts Courts which go to exempt from all liability whether as regards company or municipality. But in New York State both may be answerable for maintaining a dangerous pole: *Trustees of the Village of Geneva v. Brush Electric Company of Cleveland* (1889), 50 Hun 581; if the pole was placed by direction of the council—though they need not give such minute directions: *State v. City of Bayonne* (1896), 34 Atlantic R. 1080. See also *Sheldon v. Western Union Telegraph Co.* (1889), 51 Hun 591, affirmed 121 U. S. 697; and a late case in Maine very much like this on the facts and findings, *Cleveland v. City of Bangor* (1895), 87 Maine 259.

In my opinion the judgment should not be disturbed and it stands affirmed with costs.

[DIVISIONAL COURT.]

WAKEMAN V. THE METROPOLITAN LIFE INSURANCE
COMPANY.

Life Insurance—Insurance by Wife in Husband's Name—Ratification—Name of Beneficiaries not Inserted in Policy—Incorporation of Application—Insurable Interest of Mother in Life of Child—14 Geo. III. ch. 48, secs. 1 & 2—R.S.O. ch. 203, sec. 150, sub-sec. 1.

Where a policy of insurance was effected by a wife in her husband's name without his knowledge or consent, contrary to the rule of the insurance company, but subsequently, and after acquiring such knowledge, the husband procured two other policies to be issued in his name in the same company, signing the applications therefor, and acquiescing in the payment of the premiums on the three policies, and on these policies lapsing for default in payment of the premiums he revived the first policy, he was held estopped from denying its validity.

Where the name of a person interested in a policy of insurance is not inserted therein, but is set out in the application therefor, which is made part of the policy and incorporated therewith, it is sufficient under 14 Geo. III. ch. 48, secs. 1 & 2, and R.S.O. ch. 203, sec. 150 (1).

An insurance in a New York company, effected by a mother on the life of her child under age, is valid, whether governed by the Ontario or New York law, the R. S. O. ch. 203, sec. 150, sub-sec. 5, making such insurance valid in Ontario, whether effected before or after the passing of that Act; while the American decisions, referred to in the case, shew its validity according to the law of the State of New York.

THIS was an action tried before the County Judge of Statement. the county of York.

T. Hislop, for the plaintiffs.

W. R. Riddell, and *F. S. Mearns*, for the defendants.

The facts so far as material are set out in the judgment of the learned County Judge.

January 27th, 1899. McDougall, Co. J. :—

This is an action by the plaintiffs, to recover from the defendants all the premiums paid by Elizabeth M. Wakeman upon five several policies of life insurance. Three of these policies were issued upon the life of the plaintiff W. H. Wakeman, and two upon the life of Rose Wakeman, a child of about seven years of age and a daughter of the two plaintiffs.

Judgment.

McDougall,
Co. J.

It is claimed by the plaintiffs as to the policies effected upon the life of W. H. Wakeman, that the defendants wrongfully and fraudulently issued the said policies without any application from or any knowledge or consent upon the part of the said W. H. Wakeman; that the policies so issued were secretly delivered to the plaintiff Elizabeth M. Wakeman, the wife of W. H. Wakeman, without any knowledge or consent of her co-plaintiff the insured; that the said Elizabeth M. Wakeman relying on the representations that the policies so issued to her without her husband's knowledge or consent were valid and effectual policies, paid the premiums from time to time out of the moneys of her husband, left by him in her hands for household expenses. Similar averments are made with respect to the two policies on the life of the child Rose Wakeman, the said policies being stated to have been applied for without the knowledge or consent of the plaintiff W. H. Wakeman, and that the premiums paid in respect of the said last two mentioned policies were paid by Elizabeth M. Wakeman, the mother of the child, from her husband's moneys.

The statement of claim then further avers that the policies were issued or purported to be issued, under and subject to the rules and regulations of the defendants. By such rules and regulations, which it is averred were never communicated to the plaintiff Elizabeth M. Wakeman, the policies in question were null and void, and as the payment of premiums was made by Elizabeth M. Wakeman, induced by the fraud and deceit of the defendants, she ought to recover them back, there never having been any valid consideration for any such payments.

The plaintiffs further claim that these policies are illegal and void under 14 Geo. III. ch. 48, secs. 1 & 2, and section 150 of the Ontario Insurance Act, because the name or names of all parties interested therein, or for whose benefit the policies were issued, are not inserted in the said policies.

The plaintiffs further aver that they only learnt of the

defendants' fraud and of the nullity of the policies in question just before the commencement of the present action.

Judgment.
McDougall,
Co. J.

The defendants deny all allegations of fraud, and declare that the issue of all the policies was with the full knowledge and consent of W. H. Wakeman; and as to the first policy they allege that, if it should appear that the application was not the application of said W. H. Wakeman or of his agent or other person duly authorized, then that such application and policy were subsequently approved and ratified by the said plaintiff W. H. Wakeman.

The defendants further contend that the contracts for the policies upon the life of Rose Wakeman were entered into in the city of New York, and that the said Elizabeth Wakeman was the sole beneficiary under these policies, or intended by the contract so to be; and by way of counterclaim ask if these latter policies do not shew that Elizabeth M. Wakeman is the sole and only beneficiary therein the said two policies be rectified and be made to conform to the agreements made and entered into between the parties.

The plaintiffs' reply that the defendants' agent fraudulently induced the plaintiff Elizabeth M. Wakeman to sign her husband's name to the application for the first policy upon her husband's life without his knowledge, and that any act or deed which the plaintiff W. H. Wakeman did after the issue of the policy tending to shew approval or ratification, was upon the belief that such original policy had been valid at its inception, and in ignorance of its actual invalidity *ab initio*.

Without reviewing the evidence in detail I make the following findings of fact :—

1. The application for the first policy upon the life of W. H. Wakeman was made by Elizabeth M. Wakeman who signed her husband's name as the person applying for the insurance without his knowledge or consent in the presence of and with the knowledge or consent of the company's agent, and upon the agent's representations that it was unnecessary to procure the husband's own signature thereto.

Judgment.
McDougall,
Co. J.

2. That W. H. Wakeman personally signed with full knowledge the applications for the second and third policies upon his own life.

3. That in December, 1889, the date of the second application upon the life of W. H. Wakeman, he learned of the existence of the first policy taken out by his wife upon his life, and was aware of and acquiesced in the payments of premiums made upon all three policies on his own life thereafter till they lapsed in the fall of 1895, through nonpayment of premiums.

4. That no fraud or misrepresentation has been proven to have been practised upon the plaintiffs, or either of them, in procuring the applications or policies issued therein for the second and third policies on the life of W. H. Wakeman, or as to the two policies upon the life of Rose Wakeman.

5. That on December 10th, 1896, the plaintiff W. H. Wakeman, applied to the defendants in writing to revive the first policy upon his life, the original application for which had been signed by his wife. That at the date of such application for revival all three policies upon his life had lapsed. There was no discussion as to the validity or invalidity of the first or any of the policies. They were spoken of and dealt with by all parties as policies which had simply lapsed by reason of nonpayment of premiums, and the only question considered by the plaintiffs was as to which would be the most beneficial policy for him, W. H. Wakeman, to revive. It was decided after discussion that to revive the earliest in point of time would be most advantageous to him, and the application to revive the earliest policy was accordingly written and duly signed by the plaintiff.

Now, what was the position of the first policy prior to the default in paying premiums in 1895? First, so far as the company was concerned it cannot be regarded as either a void or voidable contract. It is true that one of the regulations of the company was to the effect that "Under no circumstances can an application be written upon the

life of a husband for the benefit of a wife * * unless the life on which the policy applied for fully understands and consents to the insurance, * * and personally signs the examination form on the back of the application * * . Any policy obtained in violation of the rules will be null and void." But the signing of the application in this case by the wife for the husband, with the assent of the company's agent, there being no fraud or misrepresentation on her part of her authority to sign, followed by the issue of a policy and the receipt of premiums by the company, would estop the company from repudiating the contract. This view is amply sustained by a large number of American authorities: *Mailhoit v. Metropolitan Life Ins. Co.* (1895), 87 Me. 374, 25 Ins. L. J. 103; *Insurance Co. v. Wilkinson* (1871), 13 Wall. U. S. 222; *Insurance Co. v. Mahone* (1874), 21 Wall. U. S. 152; *New Jersey Ins. Co. v. Baker* (1876), 94 U. S. 610. In the New York Courts also *Baker v. Home Life Ins. Co.* (1876), 64 N. Y. 648; *Miller v. Phoenix Mutual Life Ins. Co.* (1887), 107 N. Y. 292; *O'Brien v. Home Benefit Society of New York* (1889), 117 N. Y. 310. There are cases to the same effect also in Ohio, Iowa and Michigan.

Judgment.
McDougall,
Co. J.

Then as to the position of the insured. No doubt as to the plaintiff W. H. Wakeman if the original proposal for insurance was unauthorized by him he could avoid the contract upon becoming aware of its existence. He did become aware of its existence at the time he applied for the second policy in 1889, and with that knowledge signed the application for additional insurance in the same company. In this second application the first insurance is recited as outstanding and the policy referred to by its number. Later a third policy is taken out in the same company and in the same way refers to the two other policies as current policies. This, in my opinion, is quite a sufficient acquiescence in the former act of his wife in procuring the first insurance, amounting to the adopting of her act as his own. But if these acts are not in themselves sufficient the express application by him for a revival of the

Judgment. first policy made in 1896, more than a year after all three policies had lapsed for nonpayment of premiums, would amply establish a confirmation and adoption by him of the original application for the first policy. In *Robinson v. Gleadow* (1835), 2 Bing. N. C. 156, it was held that acquiescence in unauthorized insurance might be inferred from the fact that no objection was made by the principals when they became fully aware of what had been done in their behalf. See also *French v. Backhouse* (1771), 5 Burr. 2728.

McDougall,
Co.J.

I have therefore arrived at the conclusion that the three policies on the life of W. H. Wakeman were valid contracts of insurance, subject, of course, to the further objections taken by the plaintiffs.

One of these objections is that all five policies are void because they infringe the provisions of 14 Geo. III. ch. 48, secs. 1 and 2, because the name or names of all persons interested therein, or for whose benefit the policies were issued, are not inserted in the policies. In all five policies the applications are made part of the policies; and it has been held in *Collett v. Morrison* (1851), 9 Hare 162, that where in the proposal and agreement for an insurance policy, the latter is drawn up by the insurance office in a form differing from the terms of proposal and agreement, the Court will look at the agreement and not at the policy. To the same effect is *Venner v. Sun Life Ins. Co.* (1890), 17 S. C. R. 394, 399.

In the three applications for insurance on the life of W. H. Wakeman, they each purport to be an application by W. H. Wakeman, the insured, for an insurance upon his own life, with the nomination in each case of his wife Elizabeth M. Wakeman, as the beneficiary to whom the insurance shall be payable.

Similarly in the case of the applications for insurance upon the life of the child Rose Wakeman, they purport to be applications by the mother for the insurance upon the child's life, and she, the mother, names herself as the beneficiary.

The clause referring to the beneficiary inserted in each of the five policies instead of inserting the name of Elizabeth M. Wakeman as beneficiary reads substantially as follows: "The production by the company of this policy, and a receipt for the sum assured signed by any person furnishing proof satisfactory to the company that he or she is executor or administrator, husband or wife or relative by blood, or lawful beneficiary of the insured shall be conclusive evidence that such sum has been paid to and received by the person or persons lawfully entitled to the same, and that all claims and demands upon the said company under this policy have been fully satisfied."

Judgment.
McDougall,
Co. J.

These policies are valid, in my opinion, upon the construction that has been placed upon 14 Geo. III. ch. 48, by reading the applications into the policies. The name Elizabeth M. Wakeman, wife of the insured, should be treated as inserted in three of the policies, and the name Elizabeth M. Wakeman, mother, as inserted in the other two policies.

It was argued that the mother had no insurable interest in the life of the child prior to R. S. O. ch. 203, sec. 150, or rather of the statute of which it is a consolidation, 55 Vict. ch. 39, sec. 35, sub-sec. 5 (O.), (1892). That objection would have been fatal; but sub-sec. 5 of sec. 150, enacts that "in respect of all insurance heretofore or hereafter effected upon the life of persons under twenty-one years of age, where such insurance has been effected by a parent upon the life of the child, such insurance shall not be deemed to be invalid by reason only of the parent's want of pecuniary interest in the life of the child."

These policies on the life of Rose Wakeman were issued on the 10th November, 1890, and 30th November, 1891, respectively. Neither the Ontario Insurance Act nor 14 Geo. III. ch. 48, therefore, assist the plaintiffs.

Upon the whole case I find that none of the said policies were void *ab initio*. The first policy upon

Judgment. the life of W. H. Wakeman was binding on the
McDougall, company from its inception, but was at one time void-
Co. J. able at the instance of the plaintiff W. H. Wake-
man. He did not choose to avoid it but sanctioned
its being kept up for many years, and finally after it had
lapsed for nonpayment of premiums he expressly revived
it, and resumed payment of premiums thereon till shortly
before the commencement of this action. Whatever opinion
one may form as to the propriety or the wisdom of this
method of insurance or as to the nature of the contract
issued by this company, it is somewhat late in the day
to seek to recover back the premiums after paying for so
many years without objection or complaint. All the facts
of this case go to shew that the plaintiff W. H. Wakeman
was at first much opposed to life insurance, but later he
fell into his wife's view and took out two additional poli-
cies himself on his own life. He may not have yielded
gracefully or cordially, but he gave way to domestic pres-
sure. Before doing so he was fully cognizant of what had
taken place with regard to the first policy. It was then
that he was in a position to repudiate it and claim a return
of the premiums. In my opinion his subsequent conduct
closed the door to any such relief.
The plaintiffs fail upon all grounds, and their action will
therefore be dismissed with costs.

From the judgment the plaintiffs appealed to the Divisional Court,

On March 13th, 1899, the appeal was argued before BOYD, C., and ROBERTSON, J.

T. Hislop, for the appellants.

W. R. Riddell, and *F. S. Mearns*, for the defendants.

The arguments and authorities referred to sufficiently appear in the judgments.

May 19th, 1899. The judgment of the Court was Judgment.
delivered by Boyd, C.

BOYD, C.:—

As to the appeal upon the policy effected by the wife in using the name of her husband without his privity at the outset, this was no doubt in violation of the rule of the company, but was not complained of or objected to, and now the policy itself has expired, and before the lapse the husband was aware of what had been done in his name and acquiesced therein. Payments were made afterwards in respect of premiums. And further, after the lapse there was a new transaction, set out in the judgment below, by which the husband elected to revive this first and oldest policy for the reason that the premium was less by reason of its age and so more beneficial to him. This revived policy again ran out for nonpayment, and now the action is brought to recover the premium because, as argued, the policy never attached. It does not appear to me this contention should succeed. The policies are now at an end because of the default of the insured, and during their currency no question was raised by the company against their validity. Again the husband adopted what was done by the wife in 1889, and still further actively availed himself of the benefits of the first policy by the revived policy on the same party in 1896. Having thus elected to treat the policy as valid, it does not appear open to him or his wife after the lapse of years to contend that it was utterly fraudulent and void—whatever he might have done on the matter first coming to his knowledge. Though it may have been voidable for fraud it was valid till avoided, and in this case it remained a contract during its continuance: *Clough v. London and North-Western R. W. Co.* (1871), L. R. 7 Ex. 26, 34, adopted in *Morrison v. Universal Marine Ins. Co.* (1873), L. R. 8 Ex. 197, and *Mailhoit v. Metropolitan Life Ins. Co.* (1895), 25 Ins. L. J. 103.

The company never repudiated, and were never called

Judgment.

Boyd, C.

on to repudiate the contract. Had the matter been put to them at the outset it may well be that they would have affirmed the act of their agent rather than cast discredit on the methods of the company. But, however that may be, it does not appear to me now open to argue that the premium should be returned because the company might have avoided the policy. Had they done so the premium paid would probably be returnable, but, not having done so and the policy having lapsed, it is now too late for the insured to seek restitution. The policy was not necessarily void or illegal or *ultra vires*, and if not, it was competent for the company to waive what was irregular or objectionable, and recognize the insurance as properly obtained, and to all intents valid: *Mailhoit v. Metropolitan Life Ins. Co.* (1895), 25 Ins. L. J. 103; S. C., 87 Me. 374; *Armstrong v. Turquand* (1857), 9 Ir. C. L. R. 32.

From the company's side the policy was all along regarded as operative—they were never called upon to affirm or disaffirm it until the time when the policies had all lapsed. Then the agent of the company, Mr. Thompson, intervened actively, and the first policy (now in question) was then certainly treated by both parties as valid—both acted on that understanding, and it was made the basis upon which the revival of the new policy was undertaken by the company for the benefit of the plaintiffs.

Apart from all authorities, their dealings supply a sufficient answer to any attempt ever to take retroactive action against the validity of the lapsed policy, so as to recover any or all of the premiums. I am well satisfied to affirm the judgment of the County Court, with costs, as to this policy.

In *Brothers v. Metropolitan Life Assurance Co.*, in appeal before the Queen's Bench Division, and not reported, the essential difference from this case rests in the fact that when the husband knew of the insurance being in his name, and was informed that it was invalid, because obtained by his wife using his name, he elected to avoid the policy and sued for the return of the premiums. Here he elected not to

avoid, but to deal with a company for an advantage based upon the voidable policy.

Judgment.

Boyd, C.

It remains to deal with the other policies upon the life of the child. It is set up by the plaintiffs that these are void under 14 Geo. III. ch. 48, secs. 1 and 2, and section 150, sub-sec. 1 of the Insurance Act of Ontario, R. S. O. ch. 203, because of the non-insertion in the policy of the name of the person interested therein. This objection is well answered by the Judge of the County Court inasmuch as by the terms of the policy the application is to be read as incorporated therewith, and that satisfies the law: *Worsley v. Wood* (1796), 6 T. R. 710, 720.

A great part of the argument was occupied in discussing what law, whether of Ontario or of New York was applicable. No point of this kind is made in the pleadings; on the contrary, the contention of the 14th paragraph of the claim is that Canadian law governs the policies, and there is really no proper evidence to lay a basis for determination on this point. If Ontario law governs, then the insurance on the life of the child by the mother is legalized by retroactive legislation, which binds this company: 55 Vict. ch. 39, sec. 35, sub-sec. 6 (O.).

This statute coming into force on 14th April, 1892, made valid all such insurances theretofore effected, covering, therefore, these two of 1890 and 1891.

If New York law obtains, then I find it decided long before the making of this insurance, that a parent has an insurable interest in the life of a child: *Grattan v. National Life Ins Co.* (1878), 15 Hun 74, 76; *Loomis v. Eagle Life and Health Ins. Co.* (1856), 6 Gray (Mass.), 396; and *Reif v. Union Mutual Life Ins. Co.*, 17 Ins. Chron., p. 3, cited in May on Insurance, 3rd ed., sec. 107, p. 180. In this regard the American law is more liberal than the English, as expounded in *Halford v. Kymer* (1830), 10 B. & C. 724.

This ground of action also fails, and the appeal is dismissed with costs.

[DIVISIONAL COURT.]

MASON

V.

THE MASSACHUSETTS BENEFIT LIFE ASSOCIATION.

ALLEN'S CASE.

O'DEA'S CASE.

Insurance — Life Insurance — Transfer of Business — New Contract — Validity of — Misrepresentation as to Age — Effect of — Dominion License — Registration in Ontario — 55 Vict. ch. 39, sec. 34 (O.) — Pedigree.

A Canadian benefit association, in which the assured held certificates of insurance, transferred its assets and business to an American association, who issued new certificates, sealed with its seal and signed in the United States by the president and treasurer, which were sent to, but were not to be operative until countersigned by, the Canadian agent, and delivered to the insured on payment of the premiums, all of which was done.

The claimants sought to prove claims on the certificates in winding-up proceedings, and the Master found on the evidence, in one case consisting partly of an entry in an alleged family Bible containing a record of births, that misrepresentations as to age had been made in both cases by the assured and disallowed the claims, and that as the contracts had been made with a friendly society previous to the passing of 55 Vict. ch. 39 (O.), The Insurance Corporations Act, 1892, the claimants were not entitled to the benefit of section 34 of that Act, under which misstatements as to age made in good faith do not avoid the contract, and, following *Cerri v. Ancient Order of Forresters* (1898), 25 A. R. 22, the misrepresentation being material was fatal to the contracts :—

Held, on appeal, that there was a novation and a new contract between the American association and the assured, which came into existence after the above Act came into force, as the association were validly doing business in Canada by license under sec. 39 of R. S. C. ch. 124 : that the contract being completed in Canada was subject to statutory conditions imposed for the benefit of the public, and that the claimants were entitled to the benefit of secs. 33 & 34 of 55 Vict. ch. 39 (O.).

Statement.

THESE were two appeals from the Master in Ordinary, one by Robert Allen, who was assignee of Isabella Curry, and one by Harriett O'Dea, both of whom sought to prove claims for total disability under policies against the Massachusetts Benefit Life Association in winding-up proceedings.

The facts are fully set out in the judgment of FERGUSON, J. Statement.

The Master had disallowed both claims on the ground of misrepresentation as to age.

In the ALLEN CASE the representation was made in the answer of the insured to the question in the application for insurance as to the date and place of her birth.

The Master gave the following judgment.

THE MASTER IN ORDINARY:—

In disposing of this claim it must be understood that the assignee takes it subject to all equities and rights existing between the insured and the company at the time the assignment was made, as stated in the clauses relating to choses in action in R. S. O. (1887) ch. 122.

The applicant, in stating her age in her application for insurance, refers specifically to the entry of it in the family Bible. In answering the questions respecting "date and place of birth," she says, "1835, month of November, but cannot say, as the figure is obliterated in the old Bible."

She thus refers to the entry in the Bible as furnishing authentic information of the time of her birth. The Bible has since been produced, and I think the date is there clearly given. This reference to the entry of her birth in the Bible is an admission and may, I think, import the rule that where a contract refers specifically to another document, that document may be used in construing the contract.

Another fact proved is that the claimant is a nephew of the insured and therefore a member of her family; and witnesses have proved that the family Bible was recognized among all the members of the family as containing their family record. Now, if there was an intestacy and no intervening claims, a part of this fund, if realized under this insurance, might go to the claimant, Allen, as a member

Master in
Ordinary.

of the family by descent, and, in establishing his claim, the Bible would enable the parties to determine his claim and that of others according to the family record.

But leaving these matters aside, there are dates and facts proved in the case which, I think, settle beyond question the age of Mrs. Curry. The brother states that he was born in 1828. Mrs. Curry states that he must be about sixty-seven or sixty-eight; and then, when asked, if he might not be seventy, she said he must be. The examination took place in 1898, so I think that this evidence proves that the brother was born in 1828. Then the brother's evidence shews that there was a daughter born who was two years younger than he was, which would fix 1830 as the year of her birth; and it was also proved that Mrs. Curry was two years younger than that daughter, which would make the date of her birth the same as that given in the family record in the Bible, namely, in the year 1832.

There is however further evidence given by herself from which a computation can be made. She says that she was married when she was sixteen and a half, or sixteen years and seven months old, and she says she and her husband lived together for forty-six or forty-seven years at Amaranth, and then removed to the town line the year before he died, and that after his death she removed to Orangeville, two years before November, 1898.

Assume their married life continued for forty-seven years, and add to it her age at marriage, sixteen and a half, would make her sixty-three and a half when he died in March, 1896. Add to these figures the two years in Orangeville, and she must have been about sixty-five or sixty-five and a half years old at the time of her examination in 1898, which would make the date of her birth about 1832 or 1833. Thus from computations of years based upon her own admissions she must have been older than the age given by her in her written application.

The case of *Swett v. Citizens' Mutual Relief Society* (1886), 78 Me. 541, shews that in applications for insur-

ance a misstatement of the age of the applicant invalidates a claim.

Master in
Ordinary.

Another point may be referred to. The Acts 10 & 11 Vict. ch. 14, sec. 16, as amended in 1849 by 12 Vict. ch. 90, required all clergymen to make returns to the proper officers of the marriages which had taken place between persons within their jurisdiction. I think, therefore, that the entries in the parish register of her marriage in 1850 produced by the clergyman, and made under an Act of Parliament, are admissible as evidence.

On the questions of fact, I find that Isabella Curry was four years younger in 1898 than her brother William, which would make her age sixty-six, or, if you compute the years from her marriage in 1850, she would be sixty-five or sixty-five and a half years old in 1898. Either computation will shew that the statement of her age in the application was erroneous.

I might mention incidentally that a decision of Lord Mansfield, reported in Cowper's Reports, p. 591 (*Goodright ex dim, Stevens v. Moss* (1777)), seems to recognize the entries in a family record as admissible evidence in an ejectment case.

There is also the case of *Inhabitants of North Brookfield v. Inhabitants of Warren* (1860), 16 Gray (Mass.) 171, where Chief Justice Bigelow held that a recognized family record was admissible not only in pedigree matters, but in all other cases whenever the question of age was a legitimate subject of judicial enquiry and investigation. See also *American Life Insurance and Trust Co. v. Rosenagle* (1875), 77 Pa. 507; Greenleaf on Evidence, par. 103 and notes.

But, following the decision in *Cerri v. Ancient Order of Forresters* (1898), 25 A. R. 22, I must dismiss the claim with costs.

In the O'DEA CASE the parties agreed upon a special case, reciting the formation of the Canadian Mutual Life Association and the transfer of its business to the

Master in
Ordinary.

Massachusetts Benefit Life Association; the application of the appellant for membership, her payment of all premiums and assessments, her claim for total disability, and an admission that in her application for membership her age "was incorrectly stated, and that she was in fact older than the age given in the said application by five years." Her affidavit as to the *bona fides* of the error respecting her age was read by consent. The questions argued before the Master were as to the admissibility of the evidence as to *bona fides*, and the effect of the misstatement as to age. The Master held that he could not make a finding on evidence as to *bona fides*, which the Court of Appeal in *Cerri v. Ancient Order of Forresters* (1898), 25 A. R. 22, held not to be material evidence in disposing of a similar claim; and that the fact of the misstatement of age could not be got over according to that decision.

From these decisions both Robert Allen and Harriet O'Dea appealed, and the appeals were argued on May 2nd and 3rd, 1899, before a Divisional Court composed of BOYD, C., and FERGUSON, J.

Marsh, Q.C., for Robert Allen. The evidence did not prove a misrepresentation as to age. The Master erred in treating this as a pedigree case: *Haines v. Guthrie* (1884), 13 Q. B. D. 818, and the Bible was erroneously received as well as the hearsay evidence: Phipson's Law of Evidence, 2nd ed., 291-92. Even if the misrepresentation was proved, it was not shewn that it was made in bad faith or with intention to deceive, and the insured are entitled to the benefit of sec. 34 of the Insurance Corporations Act, 1892, 55 Vict. ch. 39 (O.). The Master also erred when he held that the original contract of insurance governed, as there was a complete novation at the time of the issue of the new certificate by the Massachusetts Association and its adoption by the signature of the proper office in Canada and payment of subsequent premiums by

the insured. It is true the Massachusetts Association did not register under the Ontario Act, 55 Vict. ch. 39 (O.), until September 23, 1892, and the new certificate was issued on August 1, 1892; still their application for license had been lodged June 24, 1892, and they were entitled to an Ontario license as a statutory right, under sec. 6 (1), (2), and sec. 41 (2) of the Insurance Corporations Act, 1892; besides which they were then doing business in Canada under a Dominion license, R. S. C. ch. 124, sec. 39, and were entitled to continue so doing, even without registration, until December 31, 1892, as sub-sec. (1) of sec. 27, 55 Vict. ch. 39 (O.), impliedly gives them that right. The contentions that as the certificate was executed in Boston, Ontario law does not apply and the contract was *ultra vires* of Ontario law are met in *The Citizens' Insurance Co. v. Parsons* (1880), 4 S. C. R. 215; (1881), 7 App. Cas. 96. On the question of novation I refer to *Re Massachusetts Benefit Life Association; Babcock's Case* (1899), 30 O. R. 314, and Robbins on Mortgages, 1456. The costs of the appeal and the costs in the Master's office should be paid in full by the liquidator out of the assets of the company and should not be added to the claim and left to rank on the estate: *In re Trent and Humber Shipbuilding Co., Bailey and Leetham's Case* (1869), L. R. 8 Eq. 94; *In re Marseilles Extension Railway & Land Co., Smallpage's and Brandon's Cases* (1885), 30 Ch. D. 598; *In re R. Bolton & Co., Salisbury-Jones and Dale Case*, [1895] 1 Ch. 333.

W. R. Smyth, for Harriet O'Dea. It is true there was a mistake made by Mrs. O'Dea as to her age, but it was made in good faith, and the best evidence of that is that as soon as she discovered it she informed the Association. The Ontario statute applies in her case, and she is entitled to the benefit of section 34 and to prove for the lesser amount. [BOYD, C.—So far we are inclined to think the statute applies, and will hear Mr. Watson.]

Watson, Q.C., contra. The Master's finding as to the misrepresentation is correct and is supported by the

Argument.

Argument. weight of the evidence. Again, it may be well stated that even if it was not so supported there was some evidence to support it, and the finding will not be interfered with unless it is manifest to the Court here that it was not supported by the weight of the evidence. The Ontario Insurance Corporation Act (1892), 55 Vict. ch. 39 (O.), only applies to registered companies, and this association was not registered until September 23rd, after the alleged contract of insurance was made, and the alleged novation does not benefit the claimants. *Clarke v. Union Fire Insurance Co., Re Export Lumber Co.* (1884), 6 O. R. 223, shews that the law of Massachusetts governs the contract, for it was there it was made, notwithstanding something had to be done by the agent in Ontario to give it effect; and 56 Vict. ch. 32, sec. 10 (O.), does not affect it. The Ontario Insurance Corporation Act, 1892, does not apply to benefit companies, to which class this association belonged. *Cerri v. Ancient Order of Forresters* (1898), 25 A. R. 22, cannot apply here unless there was a new contract with the Massachusetts Association, and that was not the case, as there was no release to the Canadian Mutual Life Association. I refer also to *Hamlyn & Co. v. Talisker Distillery*, [1894] A. C. 202; Dicey's Conflict of Laws, pp. 540, 563; *Lee v. Abdy* (1886), 17 Q. B. D. 309; *Bunnell v. Shilling* (1897), 28 O. R. 336.

Marsh, in reply. It was not necessary to release the Canadian Mutual Life Association when the agreement and all the dealings between the two associations shew the intention of the transaction.

Smyth, also in reply. 55 Vict. ch. 39, sec. 33 (O.), provides that any condition relied upon by the insuring corporation must be endorsed on the insurance contract, but the application may now be looked at: 58 Vict. ch. 34, sec. 5, sub-sec. 10. And as the contract here was made before the latter Act was passed and is without any conditions, the association is estopped from setting up that the misrepresentation was a warranty. The place where the certificate is countersigned is the place of the contract: *Joyce on Insurance*, sec. 229.

May 12, 1899. BOYD, C.:—

Judgment.

Boyd, C.

On 20th July, 1892, the Canadian Mutual Life transferred all its business and assets to the Massachusetts company and certificates were issued, dated 1st August, 1892, to the two persons Curry and O'Dea, thereafter insured for life or disability with the Canadian company.

These certificates were contracts with the parties insured by the Massachusetts company to make good the amount insured and to be attached to and made a part of the original contract with the Canadian company.

These certificates were not to be operative until countersigned by the resident agent in Ontario of the Massachusetts company. These certificates were accepted by the parties insured and thereafter all premiums were duly paid thereunder to the Massachusetts company.

The effect of this transfer of business and issuing of certificates to the assured was to make a new contract of insurance with the Massachusetts company on the same terms as existed with the old company. This new contract, however, came into effect and existence after the Ontario statute of 1892, and is subject to its terms. The Massachusetts company was then validly carrying on business in Ontario, being licensed under sec. 39 of the Dominion Insurance Act, R. S. C. ch. 124, and as such was within the meaning of the Ontario Act of 1892, secs. 2, 6, 12, 27, 33 and 34. These last sections, therefore, modify the old terms expressed in the certificate issued by the original company, so that the new contract with the Massachusetts company must be read in conjunction with the Ontario Act of 1892. This appears to me to be altogether irrespective of the time when the Massachusetts company actually registered; as they were actually doing business they became subject to the operation of the Act so far as sub-sections 33 and 34 are concerned.

The fact of the certificate not being valid till countersigned in Ontario, renders the whole contract one subject to Canadian or Ontario law, which, however, does not seem

Judgment. important, because the company coming into the Province
Boyd, C. to do business must be subject to the statutory conditions imposed for the benefit of the public.

I have no doubt but that the transaction between the companies for transferring business and the adoption of the new company by the insured, and the subsequent payment of the premium to their agents was a novation or at least a substitution of one contract and one liability for another, that is the earlier for the later. The law is all collected in Reilly's *Albert Arbitration Cases*: *Kennedy's Case* (1871), p. 5; *Dale's Case* (1871), p. 11; *Whitehaven Bank Case* (1871), p. 62; and *Fagan's Case* (1871), p. 179.

As to O'Dea it is not disputed that there was an honest misstatement as to her age and her claim to prove for total disability should be allowed.

As to Mrs. Curry, I think that no misstatement has been established as to her age and she should be allowed to prove as of course upon total disability.

The Master erred in letting in a certain family Bible produced—it was not the family Bible, and certainly not the one referred to by Mrs. Curry in the original application.

Great weight should be attached to this initial transaction, because it was carried out in detail by Mr. Spence, the respected and trusted agent of the company. This woman is illiterate and could neither read nor write and the answer was filled up in the writing of Mr. Spence, and his reference to the family Bible in which the date of the day was blurred, is very cogent evidence to shew that the Bible was then before him and the year was therein inscribed as written in the application.

The Master erred also I think in dealing with the question in dispute as one of pedigree as my brother Ferguson has fully discussed. The witness, Wm. Bennett, upon whose testimony the Master mainly relied, according to the written record of his evidence is extremely unobservant and inaccurate as to dates, and I should hesitate to build anything on his recollection as to years and ages.

The costs of applications and appeal should be taxed to the claimants and paid out of the assets.

FERGUSON, J.:—

Judgment.

Ferguson, J.

Robert Allen's claim by assignment from Isabella Curry and others.

This is an appeal from the judgment of the Master-in-Ordinary disallowing the claim.

Isabella Curry was the holder of a certificate in the Canadian Mutual Life Association for the sum of \$2,000, which certificate contained a provision for the payment of one-half of this sum upon total disability. There is here no question as to the total disability (within the meaning of this provision) of Isabella Curry, nor is there any question as to the propriety of the assignment of the claim to the now claimant Robert Allen.

On the 20th day of July, 1892, the Canadian Mutual Life Association transferred its assets and business to the Massachusetts Benefit Association which was an incorporated company transacting the business of life insurance upon the assessment plan in the State of Massachusetts, which association afterwards changed its name to the Massachusetts Benefit Life Association, and continued to transact such business both in the State of Massachusetts and in the Dominion of Canada until the making of the winding-up order under which the present winding-up is taking place.

Isabella Curry had paid all premiums, dues and assessments up to the time of this transfer, and was not in any respect in default regarding them.

After the transfer and in consideration of the payment thereafter by the holders of the certificate to the Massachusetts Benefit Life Association of the premiums, dues and assessments provided for in the said certificate or policy, and of such death premiums or assessments as might be called for by them, the Massachusetts Benefit Life Association entered into a contract with the said Isabella Curry, whereby, for, and in consideration of the statements and representations therein referred to, she was made and constituted a benefit member of the Massa-

Judgment. chusetts Benefit Life Association, and this association
Ferguson, J. agreed to pay on the death of the said Isabella Curry, the sum mentioned in the said certificate or policy to the person entitled to receive the same according to the terms thereof.

This contract was sealed by the Massachusetts Benefit Life Association and signed by its president and treasurer in the State of Massachusetts, and was by them sent in the month of August, 1892, to their Canadian manager in the city of Toronto and was countersigned by him, and was under his directions delivered to the said Isabella Curry.

On the face of this contract it is provided that the payment of any premium by the certificate holders would be regarded as an acceptance of the terms of the contract and Isabella Curry thereafter paid premiums and continued to pay the same down to the time of the winding-up order.

There is no question raised as to the regular and proper payments of such premiums and assessments from the beginning to the end (the winding-up).

By this contract the Massachusetts Benefit Life Association promised and agreed to pay on the death of the certificate holder the sum mentioned in the certificate to the person or persons entitled to receive the same according to the designation contained in the certificate and at the time and on the terms and conditions therein set forth.

The contract also provided that it should not be valid or binding unless countersigned by W. Pemberton Page, the chief agent in Canada and resident in Toronto. The contract was as stated above countersigned by him and delivered to the defendant.

The Massachusetts Association was licensed to do business in Canada under the provisions of section 39 of the Insurance Act of Canada by a license bearing date the 26th day of November, 1891, which license was continued and kept in force till after the making of the winding-up order under which these proceedings are.

The association upon its application bearing date the 13th day of June, 1892, and lodged in the Insurance Department of Toronto on the 24th day of June, 1892, registered under the Insurance Corporations Act of the Province of Ontario on the 23rd day of September, 1892, and this registration was continued and kept in force till after the making of the said winding-up order which occurred on the 19th day of August, 1897.

Judgment.
Ferguson, J.

The Act respecting Insurance Corporations, 55 Vict. ch. 39 (O.), was assented to and came into force on the 14th day of April, 1892. The 27th section of it provides that after the 31st day of December, 1892, no person or persons, or body corporate or unincorporated, other than a corporation standing registered under the Act, and persons duly authorized by such registered corporation to act in its behalf, shall undertake or effect, or offer to undertake or effect, any contract of insurance.

The contract between the Massachusetts Life Association and Isabella Curry, bears date the 1st day of August, 1892. I think it was and is an insurance contract, although in order to ascertain all the rights and liabilities of the parties to it a reading or examination of the certificate referred to in it is necessary, and I am of the opinion that at the time of the making of this contract of insurance there was nothing to prevent the association from making it, and that it had the right and power so to do, so far as the law of Ontario had concern.

It was contended that this was not an insurance contract, that the contract of insurance was the original certificate or policy of the Canadian Association, and that in order to shew a contract with the Massachusetts Life Association it was necessary to shew a *novatio* which could not be done without shewing that there had been a formal discharge (under seal I suppose was meant) of the Canadian Association.

The Canadian Association, as I understand, went out of business. It was said, I think, at the bar, that it is not in existence at all. The situation seems to me plain and

Judgment. free from complexity, and taking the language of Lord Ferguson, J. Cairns in the cases *Whitehaven Bank* (1871), and in *Budden's Case* (1872) decisions reported by Mr. Reilly, *Albert Arbitration*, pp. 62 and 120, respectively, as a guide, I cannot hesitate in saying that I think this contention cannot prevail. I think there was and is a direct contract of insurance between the Massachusetts Association and Isabella Curry, and that this was made in August, 1892.

It was contended that there was an error in stating her age in the application by Isabella Curry which vitiated the certificate or policy. This statement was that she was born in the year 1835 in the month of November, but could not say the day as the figure was obliterated in the old Bible.

In taking evidence on this subject the learned Master seems to have been of the opinion that the question was one of pedigree and that hearsay evidence was accordingly admissible. He was also of the opinion that as Isabella Curry had in her statements referred to the old Bible she made that or the entry in it part of her statement, and that it could be read against the claimants.

In respect to this last I think it enough to say that the old Bible to which she referred has not in my opinion been found or produced. No Bible has been found having an obliteration such as she mentioned. The one relied on as being the book was not, as I think, after perusing all the evidence on the subject, a Bible or book kept in Isabella Curry's father's house containing a record of births, etc. It had been kept in her brother's house and there is not evidence to shew that it came or was brought from her father's house and it did not contain the "obliteration." As to the question here being matter of pedigree I cannot agree with the learned Master.

The term pedigree embraces not only general questions of descent and relationship, but also the particular facts of birth, marriage, and death, and the times when, either absolutely or relatively, these events happened, provided such facts are required to be proved for some genealogical purpose: see *Taylor on Evidence*, 8th ed., sec. 642.

I am unable to see that the question here is one of, or Judgment. in the circumstances has any relation to any matter of a Ferguson, J. genealogical character, and I think the case *Haines v. Guthrie* (1884), 13 Q. B. D. 818, and the authorities referred to in it shew, at least with tolerable clearness, that such is not the case, and that hearsay evidence that would be admissible in matters of pedigree was not admissible in this instance. See also the case *Palmer v. Palmer* (1885), 16 L. R. Ir., at p. 364, where Baron Dowse says, "A case of pedigree is defined to be a controversy whether or not a certain line of genealogy can be established."

In the American & English Encyclopædia of Law, vol. 18, p. 257, pedigree is defined to be "the lineage, descent or succession of families. The principal legal question which arises on the consideration of this term is the admissibility of hearsay or secondary evidence in proof of the facts which are embraced in the general term pedigree. And, in this relation, the term embraces not only descent and relationship, but also the facts of birth, marriage and death, and the times when these events happened." In what relation? It is in relation to the lineage, descent or succession of families. In Bouvier's Law Dictionary, p. 643, pedigree is defined as "A succession of degrees from the origin; it is the state of the family as far as regards the relationship of the different members, their births, marriages, and deaths. This term is applied to persons or families who trace their origin or descent." There is, however, some evidence apparently of a direct character on the subject, which, however, commences with what must be hearsay, that is, where Isabella Curry says she was sixteen and a half years old when she was married; that after that event she lived for forty-seven years with her husband in Amaranth, and then taking the short periods afterwards which seems to make a discrepancy of about two years or perhaps a little over this. This taken without the matters I have referred to that are of a purely hearsay character should not as I think be sufficient to establish a fact against the positive and reiterated state-

Judgment. ment of Isabella Curry, who now upon her oath says just
Ferguson, J. what she said in the first place as to her age, and she says
that she arrives at her age "just by counting up."

Again, even if it were correctly found that there was an error in the statement of the age of Isabella Curry, I think every one reading the evidence throughout, and taking into consideration that she is an unlettered person would arrive at the conclusion that it appears that such statement and also what was called the warranty contained in the same application were made in good faith and without any intention to deceive, and for this reason the 34th section of 55 Vict. ch. 39 (O.), would apply if the law of Ontario is applicable to the case. As to the so called warranty the provisions of section 33 of the same Act would apply.

It was, however, contended that the law of the State of Massachusetts, and not the law of Ontario, applies, and *Clarke v. Union Fire Insurance Co., Re Export Lumber Co.* (1884), 6 O. R. 223, was referred to. The point in that case was decided or assumed to be decided in accordance with the law as laid down in Wharton on Conflict of Law, 2nd ed., par. 465. In the following paragraph (466) the same learned author says: "An insurer, however, doing business in a particular state by an agency with power to act, puts itself by so doing under the control of such state law. The agency then becomes the seat of the obligation. And where the insurance is made dependant on the action of an agent in a particular state, by whom the policy must be countersigned, then the policy is subject to the laws of such state."

In Joyce on Insurance, sec. 229, it is said: "Where the policy is not to be valid till countersigned by the agent, it will be construed according to the place where such act is performed and the policy delivered, although the policy is dated in another State and signed by the president and secretary there."

In the present case the policy or contract, as before-stated, was sealed and was signed by the president and

secretary in Massachusetts, but was not to be valid or binding unless countersigned by the principal agent here. He did countersign it and deliver it, and it is according to the statement of the law given above, and, as I think, a contract to be construed and governed according to the laws of this country.

Judgment.
Ferguson, J.

HARRIET O'DEA'S CASE.—This is also a claim for disability. The total disability is admitted or not disputed. Admitted that there was in the application a mistake as to the applicant's age. She was, however, the first to call attention to it. This she did when making her claim for disability before the winding-up order was made. She says in her testimony that when she was a mere child her people went "out West," leaving her in this country, as I understood, and that she had not the ordinary opportunity of knowing her age, but that when applying for her disability payment she made inquiry of her relatives living in the Western States and learned then first of the error, which she immediately disclosed. She says that the mistake was honestly made and without any intention to deceive. There is no evidence whatever opposing this, and I am of the opinion that the claimant is entitled to the benefit of the 34th section of the Act. It was agreed at the argument if she were so entitled the amount for which she should prove is \$875, the one-half of \$1,750.

I am of the opinion that Allen should be allowed to prove for the full amount.

The costs may be as stated by the Chancellor in his judgment.

G. A. B.

[DIVISIONAL COURT.]

REGINA V. REID.

Sunday—R. S. O. ch. 246—Ordinary Calling—Foreman of Railway Elevator—Employer.

The defendant was convicted of following his ordinary calling of foreman of the Grand Trunk Railway Company elevator in superintending the unloading of grain from a vessel into the elevator on Sunday :—
Held, that R. S. O. ch. 246 does not apply to that railway, and as it did not apply to the employer it did not apply to the employee.
Conviction quashed, with costs against the prosecutor.

Statement. THIS was a motion to make absolute an order *nisi* to quash a conviction of one Robert Reid for exercising his ordinary calling on the Lord's Day, he being employed by the Grand Trunk Railway Company of Canada as foreman of a grain elevator.

The information was "that Robert Reid of the town of Midland and county of Simcoe, being employed by the Grand Trunk Railway Company of Canada as foreman of their elevator, did, on the sixth day of November, 1898, being the Lord's Day, at the said town of Midland, unlawfully do or exercise worldly labour, business or work of his ordinary calling, the same not being conveying travellers or Her Majesty's mail by land or by water, selling drugs and medicines, or other works of necessity or work of charity, by acting as foreman of the said elevator and operating the same at the said town of Midland in contravention of an Act to prevent the profanation of the Lord's Day, R. S. O. ch. 246."

The evidence shewed that grain was being unloaded from a vessel into the elevator on that Sunday in the ordinary manner and that the defendant in his working clothes was moving in and out of the elevator and working as he ordinarily did.

The defendant was convicted and a fine was imposed with imprisonment in default of payment.

Among other grounds taken in the order *nisi* were Statement.
the following:—

1. That the statute does not apply to the defendant as he is not one of the persons named in the first section of the Act or a person *ejusdem generis* with those named.

2. That the defendant being employed by the Grand Trunk Railway of Canada a Dominion corporation, the statute does not apply to him.

3. That the statute does not apply as the Grand Trunk Railway of Canada is a Dominion railway under the British North America Act, sec. 92, sub-sec. 10 (a), and does not come within the legislative jurisdiction of the Province.

4. That the evidence shews that the defendant was engaged in a work of necessity and comes within the exception of the Act.

5. That the statute does not apply to the defendant as the evidence shews that the work was done under instructions from a superior officer.

The motion was argued on March 10th, 1899, before a Divisional Court composed of ARMOUR, C. J., FALCONBRIDGE, and STREET, JJ.

Du Vernet, for the motion. A foreman is not within the Act, even if he was, the defendant was working under the orders and instructions of his superior and had no guilty knowledge. The Grand Trunk Railway Company of Canada is not within the Act and so the servants of that railway company cannot be punished under it. I refer to *The Attorney-General for Ontario v. The Hamilton Street R. W. Co.* (1895), 27 O. R. 49; (1897), 24 A. R. 170; *Regina v. Budway* (1888), 8 C. L. T. Occ. N. 269; *Regina v. Somers* (1893), 24 O. R. 244; *Williamson v. Norris*, [1899] 1 Q. B. 7; *Regina v. Berriman* (1883), 4 O. R. 282; *Monkhouse v. The Grand Trunk R. W. Co.* (1883), 8 A. R. 637; *Washington v. The Grand Trunk R. W. Co.* (1897), 24 A. R. 183; *Curran v. The Grand Trunk R. W. Co.*

Argument. (1898), 25 A. R. 407, at p. 414; *The Queen v. Halifax Electric Tramway Co.* (1898), 30 N. S. L. R. 469; *Regina v. Spain* (1889), 18 O. R. 385.

O'Meara, contra. Unless the law is that a foreman is, as such, not included in the Act, it is a question for the magistrate to settle. A foreman is a workman in charge of workmen, and as such is within the Act wherein he is different from a farmer: *The Queen v. Cleworth* (1864), 4 B. & S. 927. *Attorney-General v. The Hamilton Street R. W. Co.* decides that a corporation is not liable; and *Regina v. Somers* decides that a servant is not liable: if both are good law the statute will not reach anyone. The Grand Trunk Railway Company is subject to Ontario legislation in the same way as any other Dominion corporation. The work done here was not necessarily incident to the working of any railway company as there is no necessity for their having an elevator at all. The case is within "civil rights" and so within the legislative power of the Ontario Legislature. Sub-sec. 10 of sec. 92 of the British North America Act, does not apply. I refer to *Leech v. Garside* (1885), 1 Times L. R. 391; *Howells v. The Landore Siemens Steel Co.* (1874), L. R. 10 Q. B. 62; *Fairweather v. The Owen Sound Stone Quarry Co.* (1895), 26 O. R. 604; *Hedley v. Pinkey & Sons Steamship Co.*, [1894] A. C., at p. 226; *The Citizens' Insurance Co. of Canada v. Parsons* (1881), 7 App. Cas., at pp. 107, 110, 113 and 117; *The Colonial Building & Investment Association v. The Attorney-General of Quebec*, 9 App. Cas., at p. 166; *Tennant v. The Union Bank of Canada*, [1894] A. C., at pp. 45, 46; *Attorney-General for Ontario v. Attorney-General for the Dominion*, [1896] A. C. 359, 360; *Monkhouse v. The Grand Trunk R. W. Co.* (1883), 8 A. R. 637. A railway incorporated under the laws of the Dominion or coming within the exceptions of the 10th sub-sec. of sec. 92 of the British North America Act, may be affected by provincial legislation: *per Patterson, J. A.*, at p. 643; *Phillips v. Innes* (1837), 4 Cl. and F. 234.

DuVernet, was not called on in reply.

At the close of the argument the judgment of the Court was delivered by

Judgment.
Armour, C.J.

ARMOUR, C. J. :—

We do not think the Act applies to servants in such a case as this. The servants of persons or corporations not aimed at or included in the statute are not more liable to the penalties or punishment than their employers would be.

The question whether the servants of persons or corporations covered by the statute are liable to conviction under it is not before us.

Here the railway company is not liable to any penalty for the work done and as they cannot do the work except through the agency of servants, the servants are not more liable than the company, their employers.

The conviction must therefore be quashed and although it is not an absolute rule of the Court to give costs against the prosecutor; still if under the circumstances of any case the Court thinks costs should be given against him it will be done. Under the circumstances of this case and especially in view of the fact that the prosecutor is entitled to a moiety of the penalty, we think he should pay the costs.

G. A. B.

A DIGEST

OF

ALL THE CASES REPORTED IN THIS VOLUME

BEING DECISIONS IN THE

HIGH COURT OF JUSTICE FOR ONTARIO.

ABATEMENT.

By Beneficiaries under Insurance Policies.]—See LIFE INSURANCE, 1.

ACTION.

Jurisdiction — Redemption — Foreign Lands — Constructive Trustees — Limitation of Actions.]—Action to have it declared that a conveyance of lands out of Ontario, made in 1878, by the plaintiff to one of the defendants, though absolute in form, was in equity a mortgage, and for redemption. The grantee in 1893 made an absolute conveyance of the lands to the other defendants. All the parties resided in Ontario:—

Semle, that had the plaintiff's grantee not conveyed to others, and the action been against him alone, it would have lain; but

Held, that the Court had no power to declare the other defendants constructive trustees of foreign lands; and also that their defence of the Statute of Limitations raised a question of title the determination of which involved the application of the law of the foreign country. *Gunn v. Harper et al.*, 650.

Staying of, Against Directors under 61 Vict. ch. 19, sec. 4 (O.).]—See COMPANY, 1.

Consolidation of Claims in Foreclosure Action.]—See MORTGAGE, 1.

ADMINISTRATION.

Of Wife's Estate, Husband not Entitled to, where he has before Marriage Renounced his Interest in Her Property.]—See HUSBAND AND WIFE.

Bond, Action on.]—See PRINCIPAL AND SURETY, 1.

ADMINISTRATOR.

Of Deceased Married Woman's Estate has Status to Set up Her Husband's Renunciation of His Interests Therein, to a Claim made by Him to Share in it.]—See HUSBAND AND WIFE.

Of Deceased Mortgagor, not Compellable at Suit of Mortgagee to seek Indemnity from a Purchaser of the Mortgaged Estate subject to the Mortgage, nor Responsible in Dam-

ages to the Mortgagee for Releasing the Purchaser.—See MORTGAGE, 2.

See EXECUTOR AND ADMINISTRATORS.

AGENCY.

Of Solicitor, to make Statements and Payments of Interest for an Executor.—See EXECUTORS AND ADMINISTRATORS, 2.

ALIENATION.

Restraint on.—See WILL, 1, 2 and 7.

APPEAL.

County Court—Order for Security for Costs—Interlocutory Order—R. S. O. ch. 55, sec. 52 (1)—Security for Costs of Appeal—Stay of Appeal—Rule 825.—In an action in a County Court, after judgment there-in dismissing the action with costs and notice of appeal therefrom to the High Court given by the plaintiffs, an order was made by the Judge of the County Court, upon the application of the defendants, requiring the plaintiffs, within four weeks, to give security for the costs of the action in addition to security already given, staying proceedings in the meantime, and directing that, in default of security being given within the time limited, the action should be dismissed with costs:—

Held, that this order was not in its nature final, but merely interlocutory, within the meaning of sec. 52 (1) of the County Courts Act, R. S. O. ch. 55, and no appeal lay therefrom.

Held, also, that the provision of

Rule 825, that no security for costs shall be required on a motion or appeal to a Divisional Court, applies to County Court appeals; and it must be assumed that the security ordered was not intended to extend to the costs of the appeal to the High Court from the judgment dismissing the action, nor the stay to the appeal itself. *Arnold et al. v. Van Tuyl et al.*, 663.

From Ruling of Master-in-Ordinary to Divisional Court.—See COMPANY, 3.

APPOINTMENT.

Power of.—See WILL, 3 and 7.

Exercise of Power of.—See LIMITATION OF ACTIONS.

ARBITRATION AND AWARD.

1. *Staying Action—Objection to Engineer as Arbitrator—Railway Contract—R. S. O. ch. 62, sec. 6.*—A clause in a contract for railway construction provided that in case any dispute arose as to the meaning of the agreement, price to be paid, etc., it should be referred to the engineer of the railway company whose decision should be final. A dispute arising as to an alleged usage of allowing an increased percentage for earthwork in embankment, the contractor brought action for it:—

Held, on motion to stay the proceedings, that although the engineer had publicly and privately expressed himself to the effect that no such usage existed, yet as he swore that he would nevertheless give the plaintiffs' contention fair consideration should the matter come before him

as arbitrator, the action must be stayed.

Jackson v. Barry R. W. Co., [1893] 1 Ch. 238, specially referred to. *Sherwood v. Balch*, 1.

2. *Payment of Amount of Award into Court—Municipal Corporations—R. S. O. ch. 199, sec. 59—R. S. O. ch. 223, secs. 445, 446—Waterworks Company—Mortgagees—Bondholders—Unauthorized Acts of Mortgagees.*—Sections 445 and 446 of the Municipal Act, R. S. O. ch. 223, which authorize the payment by a municipal corporation of money awarded for lands taken, with interest and costs into Court, apply to awards made under the Gas and Waterworks Company's Act, R. S. O. ch. 199, sec. 59, and an order for payment in may be amended so as to cover the proper amount payable, such payment to have effect only from the date of the amended order.

It is no objection to such payment in that a controversy exists between the parties to the arbitration as to their respective rights thereunder; but mortgagees and bondholders of the Waterworks Company who are not parties to the arbitration should not be affected thereby.

The acts of officers of a company, mortgagees in trust for bondholders of the Waterworks Company, under the circumstances of this case, set out in the report, in endeavouring to obtain payment of an amount awarded for the purchase money of the waterworks which acts were beyond the powers conferred by the mortgage, were held not to constitute a waiver of the rights of the mortgagees or an acquiescence in the award. *In the Matter of an Arbitration between the Corporation of the Town of Cornwall and the Cornwall Waterworks Company*, 81.

ARBITRATOR.

Railway Engineer as.—See ARBITRATION AND AWARD, 1.

ASSESSMENT AND TAXES.

1. *Arrears—Collector's Roll—Duty of Collector—R. S. O. 1887 ch. 193, sec. 135 (R. S. O. ch. 224, sec. 147)—Omission of Requirements—Illegality of Subsequent Proceedings—Responsibility of Municipality.*—Where there is sufficient property available for distress, on land assessed, during all the time in which the collector for the year has the roll, the taxes thereon cannot be legally returned to the treasurer and cannot be legally placed upon the collector's roll for a subsequent year.

The requirements of section 135 of the Assessment Act, R. S. O. 1857 ch. 193 (R. S. O. ch. 224, sec. 147), by which a collector is directed to enter on the roll opposite each assessment the reason of his inability to collect the taxes, and at the time of the delivery of the roll to the collector to furnish the clerk of the municipality with a duplicate, who thereupon is to mail a notification to each person on the roll with respect to whose land taxes appear to be in arrear for that year, are imperative, and any account delivered by the collector to the treasurer which does not conform to these requirements is ineffectual to sustain any further proceedings, in this case a distress of goods and chattels, in respect of the taxes therein set forth, and the making of the affidavit in pursuance of section 136 of the Act does not cure the defect.

Semble, when the above requirements are omitted the municipality cannot recover the amount of the arrears in any manner.

A municipality is responsible for the acts of its officers in illegally placing arrears of taxes on the roll of a collector and subsequent distress therefor. *Caston v. The Corporation of the City of Toronto*, 16.

2. *Exemptions*—*R. S. O. ch. 224, sec. 7, sub-sec. 5*—“*Public Hospital.*”—The Sudbury General Hospital was the property of private individuals, and the profits derived from carrying it on belonged to them; it had not a perpetual foundation; no part of its income was derived from charity; it was not managed by a public body; but one object of it was the benefit of a large class of persons; and the Ontario Legislature had placed it in the list of institutions named in schedule A. to the Charity Aid Act, *R. S. O. 1887 ch. 248*, and declared it to be entitled to aid under the provisions of that Act, subjecting its by-laws to the control of the Executive Government and the hospital itself to Government inspection:—

Held, that it was entitled to exemption from municipal taxation as being a “public hospital” within the meaning of sub-sec. 5 of sec. 7 of the Assessment Act, *R. S. O. ch. 224*.

Blake v. Mayor, etc., of London (1886-7), 18 Q. B. D. 437, 19 Q. B. D. 79, distinguished. *Struthers et al. v. Town of Sudbury*, 116.

3. *Taxes of Former Years*—*Tenant Primarily Liable*—*R. S. O. ch. 224, sec. 26*.—By the Assessment Act, *R. S. O. ch. 224, sec. 26*, any occupant may deduct from his rent any taxes paid by him if the same could also have been recovered from the owner, or previous occupant, unless there is a special agreement between the occupant and the owner to the contrary:—

Held, that under the above section a tenant is not at liberty to deduct from the rent and to compel his landlord to pay taxes for which the tenant and others were jointly assessed for a year prior to his existing tenancy.

Heyden v. Castle (1888), 15 O. R. 257, discussed. *Meehan v. Pears*, 433.

In Local Improvement Matters.—*See MUNICIPAL CORPORATIONS*, 2.

Taxes Paid Under Mistake.—*See MISTAKE*.

Mandamus to Pass By-law to Declare Farm Lands Exempt from Taxation Refused.—*See MANDAMUS*.

ASSETS.

Delegation of Power to Pledge.—*See COMPANY*, 2.

ASSIGNEE.

Costs, Remuneration and Disbursements of, in Winding up Estates.—*See BANKRUPTCY AND INSOLVENCY*, 1.

Liability of, on Notes Given to Continue a Business.—*See BILLS OF EXCHANGE*.

ASSIGNMENT.

Acceleration of Rent in Case of Assignment for Benefit of Creditors.—*See LANDLORD AND TENANT*, 1.

By Debtor in Division Court after Judgment Recovered in Garnishee Action, but before Payment by the Garnishee.—*See DIVISION COURTS*, 2.

See EQUITABLE ASSIGNMENT.

AUCTIONEER.

Regulation of, by By-law.]—See MUNICIPAL CORPORATIONS, 1.

AWARD.

Setting Apart Union School Section, Set Aside.]—See PUBLIC SCHOOLS.

Made Under the Gas and Water-works Company's Act, R. S. O. ch. 199, sec. 59.]—See ARBITRATION AND AWARD, 2.

Of Engineer Under Ditches and Watercourses Act.]—See DITCHES AND WATERCOURSES.

BALLOT PAPER.

Exposure of, at Election, and Refusal to Give a New One by Deputy Returning Officer.]—See PENAL ACTIONS AND PENALTIES.

BANKRUPTCY AND INSOLVENCY.

1. *Assignee for Creditors—Costs of Action Brought by—Remuneration and Disbursements of—Liability of Creditors—Indemnity.*]—An assignee for the benefit of creditors, under the Assignments Act, cannot charge creditors personally with the costs of an action brought by him on behalf of the insolvent estate, unless upon a direct or implied promise of indemnity, but must look to the assets of the estate; and so, too, with regard to his remuneration for and disbursements in winding up the estate. *Johnston v. Dulmage et al.*, 233.

2. *Proof of Claim—Promissory Note—Indorser—Incomplete Instrument—Suretyship—Maturity after Assignment for Creditors.*]—The plaintiffs, being creditors of an incorporated company, accepted an offer made by the company's president, in a letter addressed to the plaintiffs to "personally guarantee payment" of the company's debt, upon an extension of time being given, and, in order to carry out the arrangement, promissory notes were made by the company payable to the order of the plaintiffs, and indorsed by the president, who made an assignment for the benefit of his creditors, under R. S. O. ch. 147, before the maturity of three of the notes, in respect of which the plaintiffs sought to rank upon his estate in the hands of the defendant as assignee:—

Held, following *Jenkins v. Coomber*, [1898] 2 Q. B. 168, that, upon the Statute of Frauds, no action could be maintained on the notes against the president, as to whom the instrument was incomplete.

And although the correspondence and the notes taken together established an agreement of suretyship, notwithstanding the Statute of Frauds, yet proof could not be made upon such a contract when the notes guaranteed had not matured at the date of the assignment.

Grant v. West (1896), 23 A. R. 533, and *Purefoy v. Purefoy* (1681), 1 Vern. 28, followed. *Clapperton et al. v. Mutchmore*, 595.

BENEVOLENT SOCIETY.

Gratuity Certificate—Designation of Persons to be Benefited—By-laws—Wife and Children—Executors—Will.]—A gratuity certificate, issued by the Board of Trade of Toronto

to a member of the gratuity fund, for the payment, on his death, of a sum of money to his representatives, was made subject to the by-laws of the board, whereby the amount was payable to certain persons or class of persons, and in such proportions as might be designated by the member, in writing and under his signature, a blank being left in the certificate for such designation, but, unless he so designated, the amount was payable, where there was a wife and children, as was the case here, in the proportion of half to the wife and half to the children. No designation was made on the certificate by the member, and his will in no way referred to it:—

Held, that under the terms of the certificate and by-laws the amount went to the widow and children to be divided between them and formed no part of his estate in the hands of his executors. *Babe et al. v. The Board of Trade of Toronto et al.*, 69.

BILL OF SALE.

Date of Actual Execution—Interpleader Issue—Writ of Execution—Invalidity—R. S. O. ch. 148.]—The date in a bill of sale is immaterial if it is registered after its actual execution within the time required by R. S. O. ch. 148, "The Bills of Sale and Chattel Mortgage Act."

On a *bond fide* sale of goods, it is not necessary that the bill of sale shall be completed by execution of the instrument in any particular time after the actual sale. *McDonald v. Gaunt*, 398.

BILLS OF EXCHANGE.

Business Carried on by Assignee for Creditors—Note of Assignee—Personal Liability—Signature as

Agent—53 Vict. ch. 33, sec. 26 (D.).]

—An assignee of a partnership, conducting the business under a trust deed for the benefit of the creditors, gave promissory notes to the plaintiffs for goods supplied to him in connection therewith, and signed them in the firm name, followed by his own, with the word "assignee" added. The deed gave him no authority to make notes or accept bills on behalf of the firm, and the plaintiffs had previously refused to draw on the latter, requiring his own acceptance:—

Held, that under these circumstances, and having regard to section 26 of the Bills of Exchange Act, he was personally liable on the notes. *Boyd v. Mortimer et al.*, 290.

Drawn on a Company without the Word "Limited" Added, and Accepted in the Name of the Company with the Letters "Ltd." Added.]—See COMPANY, 1.

Taking Chattel Mortgage as Security for Endorsement of.]—See CHATTEL MORTGAGE, 2.

BOND.

Administration, Proof against Party Indemnifying Sureties.]—See PRINCIPAL AND SURETY, 1.

BY-LAW.

To "Regulate and Govern" Auctioneers and others.]—See MUNICIPAL CORPORATIONS, 1.

For Regulating Markets.]—See MUNICIPAL CORPORATIONS, 1.

Appointing Arbitrators to Set Apart a Union School Section.]—See PUBLIC SCHOOLS, 1.

Of Benevolent Society, Designating Beneficiaries under a Gratuity Certificate.—See BENEVOLENT SOCIETY.

Offences Against, by Incorporated Companies.—See MUNICIPAL CORPORATIONS, 3.

Omission of Dates, etc., from Published Copy, Effect of.—See MUNICIPAL CORPORATIONS, 4.

To License and Regulate Second-hand Shops and Junk Stores.—See MUNICIPAL CORPORATIONS, 5.

Bad, as Partial and Unequal in its Operation as between Different Classes.—See MUNICIPAL CORPORATIONS, 5.

Sufficiency of a Notice of a Special Meeting of a Municipal Council to Consider and Preliminaries to Passing.—See MUNICIPAL CORPORATIONS, 6.

Mandamus to Pass, Refused.—See MANDAMUS.

Invalidity of.—See MUNICIPAL CORPORATIONS, 7.

CASES.

Blake v. Mayor, etc., of London (1886), 18 Q. B. D. 437; (1887), 19 Q. B. D. 79, distinguished.]—See ASSESSMENT AND TAXES, 2.

Boldrick v. Ryan (1890), 17 A. R. 253, distinguished.]—See CHATTEL MORTGAGE, 2.

Burnnell v. Gordon (1890), 20 O. R. 281, followed.]—See EQUITABLE EXECUTION.

Central Bank of Canada, In re, Hogaboom's Case (1897), 24 A. R. 470, followed.]—See COMPANY, 3.

Cerri v. Ancient Order of Foresters (1898), 25 A. R. 22.]—See LIFE INSURANCE, 7.

Earls v. McAlpine (1881), 6 A. R. 145, followed.]—See WILL, 2.

France v. Clark (1884), 26 Ch. D. 257, distinguished.]—See COMPANY, 2.

Grant v. West (1896), 23 A. R. 533, followed.]—See BANKRUPTCY AND INSOLVENCY, 2.

Harty v. Gooderham (1871), 31 U. C. R. 18, distinguished.]—See CONTRACT.

Henderson v. Bank of Australasia (1890), 45 Ch. D., at p. 337, referred to.]—See MUNICIPAL CORPORATIONS, 6.

Heyden v. Castle (1888), 15 O. R. 257, discussed.]—See ASSESSMENT AND TAXES, 3.

Hogaboom v. The Receiver-General of Canada (1897), 28 S. C. R. 192, followed.]—See COMPANY, 3.

Hovey v. Whiting (1887), 14 S. C. R., at p. 559, referred to.]—See CHATTEL MORTGAGE.

Jackson v. Barry R. W. Co., [1893] 1 Ch. 238, specially referred to.]—See ARBITRATION AND AWARD, 1.

Jenkins v. Coomber, [1898] 2 Q. B. 168, followed.]—See BANKRUPTCY AND INSOLVENCY, 2.

Langley v. Meir, [1898] 25 A. R. 372, commented on.]—See LANDLORD AND TENANT.

Lazier v. Henderson (1898), 29 O. R. 673, followed.]—See LANDLORD AND TENANT.

Leeson v. The Board of License Commissioners of the County of Dufferin (1890), 19 O. R. 67, not followed.]—See INTOXICATING LIQUORS.

Lynn, Re (1891), 20 O. R. 475, commented on.]—See LIFE INSURANCE, 5.

Moore v. Gamgee (1890), 25 Q. B. D. 244, followed.]—See DITCHES AND WATERCOURSES.

Murray v. Scott (1894), 9 App. Cas. 519, followed.]—See COMPANY, 4.

McKibbon v. Peegan (1893), 21 A. R. 87, commented on.]—See LIFE INSURANCE, 5.

Purefoy v. Purefoy (1681), 1 Vern. 28, followed.]—See BANKRUPTCY AND INSOLVENCY, 2.

Queen, The v. Judge of County Court of Lincolnshire (1887), 20 Q. B. D. 167, followed.]—See RECEIVER, 1.

Sherlock, In re (1898), 18 P. R. 6, followed.]—See WILL, 6.

Somerset, In re, Somerset v. Earl Poulett, [1894] 1 Ch. 231, followed.]—See EXECUTORS AND ADMINISTRATORS.

Videan v. Westover (1897), 29 O. R. 1, followed.]—See LIFE INSURANCE, 3.

Wakelin v. London & South-Western R.W. Co. (1886), 12 App. Cas., at p. 52, referred to.]—See STREET RAILWAYS.

Winstanley, Re (1884), 6 O. R. 315, followed.]—See WILL, 7.

CHATTEL MORTGAGE.

1. *Erroneous Description of Dwelling-house — Falsa Demonstratio.*]—Goods intended to be included in a chattel mortgage were described therein as those mentioned in the schedule, the property of the mortgagors, situate upon the premises on the north-east corner of certain streets in a township. The schedule contained a list of the goods, which consisted of household furniture, each article being described, and the articles in each room set out under a heading describing the room. The mortgage contained a covenant that if the mortgagors should part with the possession of the goods, the mortgagee was to be entitled to take possession. One of the mortgagors was described as an "esquire :"—

Held, that, having regard to these provisions, it was to be taken that the mortgaged goods were the property of the mortgagors, in their possession, and contained in the building described in the mortgage; that that building was the dwelling-house of the mortgagors; and that the goods were the household furniture in use by the mortgagors.

Hovey v. Whiting (1887), 14 S. C. R. at p. 559, referred to.

And, although, when the mortgage was executed, the goods were in the house at the north-west corner, and not the north-east corner, the mortgage was not void; the erroneous part of the description might be rejected, and the statement that they were contained in the mortgagors' dwelling-house would remain. *Accountant of the Supreme Court of Judicature v. Marcon et al.*, 135.

2. *Affidavit of Bona Fides—Variation from Statutory Form—Liability of Indorser—Payment of Notes*

by Mortgagee—Change in Form of Security—Execution Creditors—Priorities—Assignment for Benefit of Creditors—Preference—Presumption—Rebuttal.]—The affidavit of *bona fides* made by the mortgagee in respect of a chattel mortgage given to secure him against liability in respect of his indorsement of certain promissory notes for the mortgagor, contained the expression, "and truly states the extent of the liability intended to be created by such agreement and covered by such mortgage," instead of the statutory words, "and truly states the extent of the liability intended to be created and covered by such mortgage." It also contained this clause: "And for the express purpose of securing me, the said mortgagee therein named, against the payment of the amount of such notes indorsing liability for the said mortgagor:" instead of the words, "and for the express purpose of securing the mortgagee against the payment of the amount of his liability for the mortgagor:"—

Held, that the mortgage was not void as against creditors by reason of these variations from the statutory form.

Boldrick v. Ryan, (1890), 17 A. R. 253, distinguished.

The mortgagee, having paid the notes during the currency of the mortgage, before the expiration of a year took and filed a new mortgage upon the same goods for the amount paid by him and interest, changing the form of the instrument so as to make it appropriate to an actual advance of money, but not reciting the prior mortgage or the payment. Within sixty days of this, the mortgagor made an assignment for the benefit of creditors:—

Held, that executions in the sher-

iff's hands before the second mortgage was filed, but subsequent to the prior mortgage, did not gain priority over the second; and the statutory presumption that the latter was made with intent to prefer was rebutted by the circumstances. *Rogers v. Carroll et al.*, 328.

COLLECTOR (TAX).

Duties of.]—See ASSESSMENT AND TAXES, 1.

COMPANY.

1. *Corporate Name*—"Limited"—*Abbreviation in Contract*—*Liability of Directors*—*Right of Action*—*Vested Right*—*Statutes*—"Stay" *Clause*—*Retroactivity*.]—A bill of exchange drawn by the plaintiffs upon the Burford Canning Company (Limited) was addressed to "The Burford Canning Co.," and accepted by the drawees by the signature "The Burford Canning Co., Ltd." This was a few days after the royal assent had been given to the Ontario Act 60 Vict. ch. 28, sec. 22 of which provided that in the case of contracts by limited liability companies the word "limited" should be written or printed in full, a previous statute, 52 Vict. ch. 26, sec. 2, having made the directors liable for the amounts due upon such contracts where the word "limited" did not appear after the name of the company where it first occurred in the contract. The writ of summons in this action (against the directors) was issued on the very day on which the royal assent was given to the Act 61 Vict. ch. 19, sec. 4 of which suspended the operation of the Act of the previous session:—

Held, that the use of the abbreviation "Ltd." was not a compliance with 52 Vict. ch. 26, sec. 2.

Held, also, that the address to the "Burford Canning Co." in the draft was the first place in which the name of the company appeared in the contract, but that the fact of its having been so written there by the plaintiffs did not disentitle them to recover.

Held, also, that no stay was created by 61 Vict. ch. 19, sec. 4, of any action but one brought under 60 Vict. ch. 28, sec. 22 (1), and the corresponding section of the revision of 1897, so that, upon this view of the effect of 52 Vict. ch. 26, sec. 2, the plaintiffs were entitled to recover.

If, however, the use of the contraction "Ltd." was a compliance with the last mentioned section, the plaintiffs were still entitled to recover, because the contract was made some days after the passing of 60 Vict. ch. 28, sec. 22, which required the unabbreviated word "limited" to be used; and the plaintiffs, upon the execution of the contract by the Burford Canning Company (Limited) became and remained entitled to look to the directors personally, and had a vested right of action, with which the "stay" clause, sec. 4 of 61 Vict. ch. 19, could not interfere, there being nothing in it which required the Court to hold it to be retrospective. *Howell Lithographic Company (Limited) v. Brethour et al.*, 204.

2. *Shares — Blank Transfer — Fraud — Usage of Stock Exchange — Bonâ Fide Holder for Value — Validity.*—The registered owner of shares in a company gave to her brokers, for the purpose of selling the shares, the certificate of owner-

ship upon the face of which the shares were stated to be transferable on the books of the company in person or by attorney upon surrender of the certificate and upon which was indorsed a transfer and power of attorney, signed by her, and having a blank left for the name of the transferee. The brokers improperly deposited the certificate as security for advances to them with a bank, who received it in the ordinary course of business without any notice of the owner's rights. There was evidence at the trial that, according to the usages of the stock exchanges of Ontario and Quebec, such a share certificate so endorsed passes from hand to hand and is recognized as entitling the holder to deal with the shares as owner and pass the property in them by delivery, or to fill in the blank with his own name and have the shares so registered on the books of the company:—

Held, that the bank was entitled to hold the shares as against the owner.

France v. Clark (1884), 26 Ch. D. 257, distinguished.

Decision of FALCONBRIDGE, J., at the trial, reversed. *Smith v. Rogers et al.*, 256.

3. *Winding-up—Balance in Hands of Liquidator—Payment out to Receiver-General—R. S. C. ch. 129, sec. 41—52 Vict. ch. 32, sec. 20 (D.).*—By virtue of 52 Vict. ch. 32, sec. 20 (D.), the Divisional Court has jurisdiction to entertain an appeal from the ruling and decision of the Master-in-Ordinary, on a reference to him under that section.

The judgments of the Court of Appeal and of the Supreme Court in this case (24 A. R. 470, 28 S. C. R. 192), are conclusive on the point that the moneys repaid into Court

in this matter, pursuant to those judgments, after having been erroneously paid out to certain applicants, being the balance unclaimed in the hands of the liquidator by an insolvent bank after passing their final accounts, were the property of the Receiver-General of Canada under R. S. C. ch. 129, sec. 41, subject to the liability of paying it over to the persons entitled thereto. *In re The Central Bank of Canada*, 320.

4. *Loan Company—Winding-up—Creditors—Priorities—Debenture Holders—Depositors—Power to Pledge Assets—Directors—Form of Debenture—Charge—Nature and Extent of.*]—The company being in liquidation under the Dominion Winding-up Act, a claim was made on behalf of holders of the company's debentures that they were entitled to a charge on the assets of the company in priority to depositors.

The company was formed on the 19th October, 1871, under C. S. U. C. ch. 53, by sec. 38 of which the right of a society formed under it to borrow money, if authorized by its rules to do so, was recognized.

By rule 7 of the company, passed under the authority of sec. 2 of ch. 53 C. S. U. C., the directors were authorized to borrow money for the use and on the assets of the company, to receive money on deposit, and to "loan" or invest such money either on mortgage on real estate or in any other way they might think best for the interests of the institution :—

Held, that the company was invested with the power to borrow money for its purposes, and to give security upon its assets for the payment of the money borrowed.

Murray v. Scott (1884), 9 App. Cas. 519, followed.

And this power to pledge the assets was one which might be delegated to the directors under C. S. U. C. ch. 53, sec. 5.

The debentures upon which the claimants relied were headed "Land Mortgage Debenture," and contained a promise by the president and directors to pay to the person named a certain sum at a particular time and place, with interest, and were signed by the president and secretary, under whose signatures were the following words: "The payment of this debenture and the interest thereon is guaranteed by the capital and assets of the company invested in mortgages upon approved real estate in the Dominion of Canada :"—

Held, that these instruments created a charge upon the property of the company.

Per ROSE and MACMAHON, JJ., that such charge was upon the capital and assets of the company invested in mortgages on approved real estate situate in the Dominion of Canada at the date of the winding-up order.

Per MEREDITH, C.J., that the charge was such as entitled the debenture holders to be paid out of the assets of the company in priority to the depositors and other creditors.

Ruling of the Master-in-Ordinary reversed. *Re Farmers' Loan and Savings Company. Debenture Holders' Case*, 337.

5. *List of Shareholders—Duplicate List of Shareholders—Penalty—R. S. O. ch. 191, sec. 79—Moderation of.*]—A list of shareholders transmitted to the Provincial Secretary contained the name of a person as holding a certain amount of stock in a joint stock company, while in the list posted up in the head office of the company the shareholder's name was inadvertently deleted :—

Held, that the lists were not duplicates within the meaning of R. S. O. ch. 191, sec. 79, the Ontario Companies Act, and that the company were liable to a penalty under the Act.

Circumstances considered in moderating the amount of penalty. *Towner v. The Hiawatha Gold Mining and Milling Company of Ontario*, 547.

CONTRACT.

1. *Correspondence—Quotation of Prices — Acceptance.*] — The defendants, dealers in flour, wrote to the plaintiffs, bakers, that they wished to secure their patronage as customers, and quoting prices and terms for specified kinds of flour, adding a suggestion that the plaintiffs should "use the wire to order." The plaintiffs answered by telegram that they would take two cars "at your offer of yesterday."

The defendants did not deliver the flour, and the plaintiffs sued for damages for non-delivery:—

Held, that there was no contract.

Harty v. Gooderham (1871), 31 U. C. R. 18, distinguished. *Johnston Brothers v. Rogers Brothers*, 150.

2. *Construction — Dependent or Independent Covenants—License—Forfeiture.*] — To determine whether covenants or agreements are dependent or independent, they are to be construed according to the intent and meaning of the parties, to be collected from the instrument, and to the circumstances legally admissible in evidence with reference to which it is to be construed. Where a covenant or agreement goes to part of the consideration on both sides, and may be compensated in damages,

it is an independent covenant or contract.

An agreement made between the commissioners for the Queen Victoria Niagara Falls Park (with the approval of the Government of the Province of Ontario) and the company, by which the latter were granted a license for twenty years (with provision for renewal), at a fixed rental, to take water from the Niagara river for the purpose of generating and developing electricity for transmission beyond the park, contained a provision (4) for re-entry on default of payment of rent, a provision (9) that the commissioners should not grant the same right to others during the company's term, nor themselves use the water for the same purpose, and also contained the two following clauses.

"10. The company undertake to begin the works * * on or before the 1st of May, 1897; and to have proceeded so far * * on or before the 1st of November, 1898, that they will have completed water connections for the development of 25,000 horse power, and have actually ready for use, supply, and transmission 10,000 developed horse power by the said last mentioned day."

"13. If the company should at any time or times continuously neglect for the space of one year effectually to generate electricity or pneumatic power, as hereby agreed by the company, unless hindered by unavoidable accident, the Lieutenant-Governor in Council may then and from thenceforth declare this agreement, the liberties, licenses, powers, and authorities thereby granted, and every one of them, to be forfeited, and thenceforth the same shall cease and determine and be utterly void and of no effect whatever."

The company, although they began the works by the time limited, failed to proceed with them on or before the 1st November, 1898, so as to comply with paragraph 10, not having been hindered by unavoidable accident :—

Held, that the agreement was not, by reason of such failure, determined void, and of no effect, nor could it be so declared by the park commissioners.

2. That the Lieutenant-Governor in Council, or the commissioners, could not, by reason of the non-generation of electricity by the 1st November, 1898, or by reason of the failure of the company to proceed, declare the agreement forfeited.

3. That the Government and the commissioners were not relieved from the agreement contained in paragraph 9.

Per MEREDITH, C.J.—Paragraph 10 is to be treated as a promise or covenant, and not as a condition, (1) because of its form ; (2) because the stipulation does not go to the root of the consideration, and is therefore a subsidiary promise rather than a vital one ; (3) because the agreement contained an express provision for forfeiture, in certain events—paragraph 13.

And *semble*, that a breach of the undertaking in paragraph 10 is within the provisions of paragraph 13. *Re Canadian Niagara Power Company*, 185.

3. *Consideration in Part Illegal—Stifling Prosecution.*—*Held*, affirming the judgment of MACMAHON, J., 29 O. R. 530, that the promissory notes sued upon in this action were given on an illegal agreement, of which the plaintiff must be taken to have had knowledge ; that the whole agreement, being based upon the

understanding that one of the defendants was to be discharged from custody, was illegal and void ; and the plaintiff could not properly litigate the right to certain other promissory notes transferred by one of the defendants to another. *Leggatt v. Brown*, 225.

4. *Impossibility of Performance by Act of Party—Municipal Corporations—Member Interested in Sub-contract—Duty to Resign Office—Refusal to Carry out Sub-contract—Liability.*—The defendant, who was a member of a municipal corporation, and who would have been disqualified, under sec. 80 of the Municipal Act, R. S. O. ch. 223, from entering into or being interested in a contract with the corporation, entered into a sub-contract to do the brick and mason work of a town and fire hall which was being erected for the corporation under a contract which contained a provision that the contractor should not sub-let the work or any part thereof without the consent in writing of the architect and corporation. The defendant agreed to resign his seat—though this formed no part of his written contract—which he afterwards refused to do on the ground that the corporation declined to accept him as a sub-contractor, and a resolution was passed by the corporation to that effect, whereupon the defendant refused to perform the contract :—

Held, that the defendant by his omission to resign had not done all in his power to enable him to perform the contract, and was precluded thereby from setting up the resolution of the council as an answer to his non-performance, and was liable for the damages sustained by the plaintiff. *Ryan v. Willoughby*, 411.

5. *Execution by One Party—Acceptance by the Other Party—Revocation—Damages.*]—A contract sealed and delivered by one party, which is subject to the approval of the other party, cannot be revoked by the former before the latter has had a reasonable time within which to signify his assent.

Nominal damages only allowed against the defaulting party under the circumstances set out in the report. *The Watrous Engine Works Co., Limited v. Pratt*, 538.

CONTROVERTED ELECTIONS.

See PENAL ACTIONS AND PENALTIES.

CONVICTION.

Of Railway Employee for Following His Ordinary Calling on Sunday Quashed.]—See SUNDAY.

CORONER.

Post-mortem Examination—Direction to Surgeons—Impanelling of Jury—County Crown Attorney—Consent in Writing—R. S. O. ch. 97, sec. 12 (2)—Construction—Imperative or Directory—Damages.]—The wife of the plaintiff having died suddenly, the defendants, three practising physicians and surgeons, acting under a verbal direction from a coroner for the city where the death occurred and the body lay, entered the house of the plaintiff for the purpose of making, and made there, a post-mortem examination of the dead body. The coroner had issued a warrant to impanel a jury for the purpose of holding an inquest on the body, but the warrant was afterwards withdrawn without the

knowledge of the defendants. There was no consent in writing of the County Crown Attorney:—

Held, that the coroner, having authority to hold an inquest upon the body, and having determined that it should be held, and having begun his proceedings, had power to summon medical witnesses to attend the inquest and to direct them to hold a post-mortem.

Held, also, that no rule of law forbade the making of the post-mortem before the impanelling of the jury; that was a matter of procedure in the discretion of the coroner.

Held, also, that the meaning of sec. 12 (2) of R. S. O. ch. 97 was that the coroner should not, without the consent of the Crown Attorney, direct a post-mortem examination for the purpose of determining whether an inquest should be held, but only where the coroner had determined to hold an inquest and gave the direction as part of the proceedings incident to it; but if the provision should be read differently, it was at all events merely directory, and did not render an act done by a surgeon in good faith, under the direction of a coroner, unlawful because the coroner had neglected to obtain the prescribed consent, where the act would be lawful if the consent had been obtained.

Seem, also, that if the verdict for the plaintiff had been allowed to stand, the amount of damages assessed, \$600, was excessive. *Davidson v. Garrett et al.*, 653.

COSTS.

Of Action Brought by Assignee for Creditors.]—See BANKRUPTCY AND INSOLVENCY.

COUNTERCLAIM.

Amount to be Allowed on.—See COUNTY COURTS.

COUNTY COURTS.

Counterclaim—Amount to be Set Off—R. S. O. ch. 55, secs. 28, 29.]—In an action in a County Court to recover an amount due for salary and travelling expenses there was a counterclaim for advances made to the plaintiff. The plaintiff recovered \$308.55, and the amount found to be due under the counterclaim was \$1,169.54, but the Judge allowed only \$200 to be set off:—

Held, that under secs. 28 and 29 of the County Courts Act, R. S. O. ch. 55, the defendants were entitled to judgment on the counterclaim to the full amount of the plaintiff's claim.

Judgment of the County Court of Carleton varied. *Wallace v. People's Life Insurance Co.*, 438.

Jurisdiction of, as to Injunction.]—See INJUNCTION, 2.

Appeals from, to Divisional Court, Security for Costs of.]—See APPEAL.

Order of County Court Judge for Security for Costs, not Final, but Merely Interlocutory and no Appeal Lies Therefrom.]—See APPEAL.

COUNTY CROWN ATTORNEY.

Consent of, to Coroner Directing a Post-mortem Examination to be Held.]—See CORONER.

COUNTY JUDGE.

Jurisdiction of, as to Assessment in Local Improvement Matters.]—See MUNICIPAL CORPORATIONS, 2.

Order of, for Security for Costs is not Final but Merely Interlocutory, and no Appeal Lies Therefrom.]—See APPEAL.

COVENANT.

To do Certain Work by a Named Date, Effect of.]—See CONTRACT, 2.

By Trustees for Wife in a Separation Deed, Effect of.]—See DOWER.

CRIMINAL CODE, 1892.

55 & 56 VICT. CH. 29 (D.).

Section 684.]—See EXTRADITION.

Sections 743 and 744.]—See CRIMINAL LAW.

Sections 562, 853 and 858.]—See MUNICIPAL CORPORATIONS, 3.

See, also, EXTRADITION.

CRIMINAL LAW.

Committal for One Offence—Change of Venue—Trial for Two Offences—Administering Oath—Validity of—Comment by Judge on Prisoner not Testifying—Canada Evidence Act, 1893, sec. 4, sub-sec. 2—Recalling Jury—Withdrawal of Comment—New Trial.]—The prisoner was committed for trial in one county upon a charge of perjury alleging an offence committed in that county. The venue was changed

to another county, where he was tried and found guilty upon an indictment containing two counts, alleging two offences arising out of the same matter. The facts relating to both of the charges appeared in the depositions taken by the committing magistrate:—

Held, that there was jurisdiction to try for both offences in the county to which the venue had been changed.

On the occasion when the perjury was alleged to have been committed the oath was administered to the prisoner in open court by the clerk of the county court sitting in the general sessions of the peace for and at the verbal request of the clerk of the peace:—

Held, that the witness was properly sworn.

At the trial the prisoner did not testify on his own behalf and the trial Judge in his charge to the jury, contrary to the provisions of the Canada Evidence Act, 1893, sec. 4, sub-sec. 2, commented upon that fact, although, when his attention was drawn to it, he recalled the jury and withdrew his comment:—

Held, that the prisoner had a right to have his case submitted to the jury without the comment and, having been deprived of that right, there was a substantial wrong done to him which could not be undone by calling back the jury and withdrawing the comment.

New trial ordered. *Regina v. Coleman*, 93.

See EXTRADITION.

DAMAGES.

Warranty of Title—Sale of Machine—Contemplated Profits from Use of.—The defendant company in

1893 sold a hay press to their co-defendant upon credit, and upon the terms that the property should remain in them until payment. The contract was properly filed under sec. 6 of 51 Vict. ch. 19, now sec. 3 of R. S. O. ch. 149. A few months afterwards the purchaser resold the press to the plaintiff, who had no knowledge of the facts, and was told that it was paid for and free from any lien. The defendant company seized it in the plaintiff's possession under the terms of their contract:—

Held, that the plaintiff was entitled to recover from his vendor, upon a warranty of title which he proved, the value of the press and the sum he would have received beyond expenses upon contracts actually made to press hay with the press in question, and which he was in course of executing at the time of the seizure, the use of the press in that way having been in the contemplation of the plaintiff's vendor at the time of the sale. *Sheard v. Horan et al.*, 618.

Against Deputy Returning Officer for Breach of Duty at Election.—See PENAL ACTIONS AND PENALTIES.

Excessive.—See CORONER.

Nominal.—See CONTRACT, 5.

DEBENTURES.

Priority of Holders of, over Depositors in a Loan and Savings Company in Winding-up Proceedings.—See COMPANY, 4.

DEED.

Mortgage of Land—Mistake in Name of Mortgagee—Void Conveyance—Legal Title.—In a mortgage

which was intended to be taken in the name of the mortgagee, she, by mistake, was described by a name which was not her real name, and which was one she had never assumed or been known by :—

Held, that the legal estate did not pass to her by the mortgage whatever its operation in equity ; and that she could not make a good legal title to a purchaser under the power of sale contained in the mortgage. *Burton v. Dougall*, 543

DEPOSITORS.

Rights of, as Against Debenture Holders in a Loan and Savings Company in Winding-up Proceedings.—See COMPANY, 4.

DIRECTORS.

Liability of, on Companies acceptance without the Word "Limited" Added.—See COMPANY, 1.

DISTRESS.

For Taxes.—See ASSESSMENT AND TAXES, 1.

DITCHES AND WATERCOURSES.

Award—Engineer—Jurisdiction—Omissions—Declaration of Ownership—Friendly Meeting—57 Vict. ch. 55, secs. 7, 8—*Directory Provisions—Waiver—Validating Clause, sec. 24.*—The landowner who initiated the proceedings under the Ditches and Watercourses Act, 57 Vict. ch. 55, upon which the township engineer acted in making an award, had not filed a declaration of ownership

pursuant to sec. 7, although he was in fact the owner of the land mentioned in the notice as belonging to him, and had not caused a "friendly meeting" to be held pursuant to sec. 8, before filing his requisition.

The plaintiff, whose lands were affected by the award, contended that the filing of the declaration and the holding of the meeting were acts essential to the jurisdiction of the engineer attaching :—

Held, that the provisions of secs. 7 and 8 should be treated as directory only.

Held, also, following *Moore v. Gamgee* (1890), 25 Q. B. D. 244, that the plaintiff's objections were such as could be waived, and had been waived by her appearing before the engineer and contesting the right of the initiating landowner to have the ditch made on her land and at her expense, without objecting to the engineer's jurisdiction.

Held, also, that sec. 24 of the Act applied so as to validate what was done by the engineer, in spite of the omissions. *Maisonneuve v. Township of Roxborough*, 127.

DIVISION COURTS.

1. *Jurisdiction—Notice Disputing—Extending Time for—Prohibition.*—A Division Court Judge has no power after the expiry of the time limited by sec. 205 of the Division Courts Act, R. S. O. ch. 60, for the giving of notice of intention to contest the jurisdiction of the Court, to grant leave to file a notice disputing it. *Re McLean v. Osgoode*, 430.

2. *Jurisdiction of—Prohibition.*—After the recovery of judgment in a Division Court against the primary debtor and garnishee, but before the

payment of the amount recovered, the debtor made an assignment for the benefit of creditors under R. S. O. ch. 147, whereupon an application was made by the garnishee to the Division Court Judge for an order under sec. 200 of R. S. O. ch. 60, discharging the debt from the attachment, which was refused:—

Held, that the matter being one within the jurisdiction of the Judge prohibition would not lie. *In re Dyer v. Evans*, 637.

DOWER.

Husband and Wife—Separation Deed — Trustees — Covenant as to Release of Dower — Construction of.]—In 1868 the plaintiff and her husband and trustees on her behalf executed a deed which contained an agreement for separation of the husband and wife, the conveyance of certain property by the husband for the benefit of the wife, and a number of covenants, one of which was as follows:—"And the parties of the third part"—the trustees—"hereby covenant that the said Jane Eves"—the plaintiff—"will, whenever called upon, release her dower in any lands of which he, the said James Eves"—the husband—"may hereinafter (*sic*) acquire a title." The other covenants were expressed to be with the heirs, executors, and administrators of the husband.

In an action by the plaintiff against the executrix of her husband's will, for dower in his after-acquired lands:—

Held, that this covenant was a part of the consideration for the benefits the plaintiff received under the deed, and which she had ever since continued to enjoy, and, although she did not personally coven-

ant, yet, as the covenant was entered into by her trustees on her behalf, and she was a party to and executed the deed containing it, she was bound by her recognition of and assent to it, and it would be contrary to equity to permit her to maintain the action. *Eves v. Booth*, 689.

ELECTION.

Spoiled Ballot Paper at Provincial Election.]—See PENAL ACTIONS AND PENALTIES.

ENGINEER.

Railway Engineer as Arbitrator.]—See ARBITRATION AND AWARD, 1.

Jurisdiction of and Omissions by, in Proceedings Under the Ditches and Watercourses Act.]—See DITCHES AND WATERCOURSES.

EQUITABLE ASSIGNMENT.

Equitable Assignment — Designation of Funds—Alternative—Notice—Agreement.]—A contractor, having done work under his contract with the defendants, and having brought an action against them for the contract price and for extra work, gave the plaintiff the following order:—

"S. Baltzer, Esq., Reeve Col. South.

"Please pay William Jackson Quick the sum of \$100 on account of my contract on the Richmond drain outlet."

Nearly a year afterwards—the action having been in the meantime referred and another action brought by the contractor against the defen-

dants for damages for overflowing his land—he gave the plaintiff a second order, as follows:—

“To the Reeve, Deputy-Reeve, and Councillors of Colchester South.

Sirs,—Will you kindly pay to W. J. Quick the sum of \$144.25, and charge to my contract on Richmond drain outlet or damage suit.”

Shortly after this, the referee made his report finding \$139.44 to be due to the contractor, after deducting money paid by the defendants before action and the amounts of certain other orders given by him in favour of a number of persons, not including the plaintiff.

Each party having appealed from the report, a settlement of both actions was agreed upon and carried out, by which, *inter alia*, the balance of \$139.44 was to be applied towards payment of the defendants' costs of the action for damages. Before the making of the agreement the defendants had notice of both the orders given to the plaintiff:—

Held, that both the orders were good equitable assignments; the second being an assignment of either of two specific funds, and the defendants being bound to treat it as an assignment of the one which did arise.

The agreement, carried out as it was, established conclusively that the defendants were indebted to the contractor in \$139.44, and, having had notice of the orders before the agreement, they were bound to apply that sum to them, instead of in the manner provided in the agreement. *Quick v. Township of Colchester South*, 645.

EQUITABLE EXECUTION.

1. *Interest in Land—Writ of Fi. Fa.—Necessity for—Provisions of Will—Effect as to Creditor—De-*

claratory Judgment.].—The testatrix bequeathed to her executors a sum of money in trust to be expended in the purchase of a farm for her nephew, to be conveyed to him subject to the express condition that it should not be sold, mortgaged, or affected in any way, but should be held and enjoyed by him as usufructuary during his life, and at his death should become the property of his children. She also directed that no part of her estate should be liable to seizure or attachment by any creditor of any legatee, “the same being made as and for the alimentary maintenance and support of my several legatees, and I therefore declare the same to be insaisissable.”

The executors bought a farm for the nephew and had it conveyed to themselves. Subsequently they executed an instrument in which, after reciting the will and the purchase of the farm, they declared that they stood seized of it upon the trust and for the purposes and subject to the provisions contained in the will.

In an action by a judgment creditor of the nephew to have the latter's interest in the land declared and sold to satisfy the judgment, or for a receiver to receive the rents and profits:—

Held, that the plaintiff could not reach the interest, if any, of his judgment debtor in the lands in question without having a *fi. fa.* lands in the hands of the sheriff of the county in which the lands lay, at the time of the commencement of the action.

Held, also, that if the directions of the will were effectual to prevent the lands being made liable to creditors, the judgment debtor had no interest in the land which could be made available by legal process for satisfaction of the judgment; and

if they were not effectual, there was nothing in the way of ordinary process; and in either case the action was not sustainable.

Held, also, that the plaintiff had no *locus standi* to claim a declaration as to the right of the judgment debtor in the lands.

Bunnell v. Gordon (1890), 20 O. R. 281, followed. *Thomson v. Cushing et al.*, 123.

2. *Interest in Land—Writ of Fi. Fa.—Necessity for Amendment—Practice.*—In an action by a judgment creditor for a declaration of the judgment debtor's interest in certain lands held by trustees for him under the provisions of his mother's will and for equitable execution or equitable relief:—

Held, that the plaintiff could not succeed, as his execution was not in the sheriff's hands when this action was commenced, and leave to amend so as to claim "on behalf of himself and all other creditors" was refused, as his action was not a class action.

Decision of MEREDITH, C.J., *ante* p. 123, affirmed. *Thomson v. Cushing et al.*, 388.

EQUITABLE ESTATE.

Assignment of Interest in Land—Title—Right to Possession—Subsequent Mortgage—Notice—Registry Laws—Limitation of Actions—Commencement of Statutory Period—Tenancy at Will.—The plaintiff's father, being in possession of a farm under an unregistered agreement for the sale thereof to him, assigned the agreement and all his interest thereunder by way of security to one who gave a bond to reassign upon repayment of a small sum advanced. Neither the assignment

nor the bond was registered. The money was repaid, but there was no reassignment. Subsequently, on the 3rd April, 1886, the father assigned all his interest in the land to the plaintiff for valuable consideration, the plaintiff having no notice or knowledge of the previous assignment. This assignment was duly registered. The plaintiff lived on the farm with his father and mother, whom he had covenanted to maintain during their lives, until July, 1888, when he went away, leaving his parents on the farm, with no definite agreement or understanding, but with the expectation, as he said, that they would remain on the place and make the last two payments under the original agreement, and that when this was done the place would be his. In February, 1891, the father mortgaged the land to the person who had made the first advance, to secure a larger sum, and the mortgage deed was registered. A few days later the original vendor conveyed the land to the father, the purchase money having been paid in full, and the conveyance was registered. In February, 1892, the mortgagee died. In September, 1893, the plaintiff's father conveyed the land absolutely to the administrator of the mortgagee's estate, and this conveyance was also registered.

In an action against the administrator and the plaintiff's father to recover possession of the land and for a declaration that the last mentioned conveyance was void and a cloud upon the plaintiff's title:—

Held, that the assignment to the plaintiff in 1886 gave him an equitable estate in fee and the right to possession, and after its execution, the father and son both being on the place, the possession would be attributed to the son.

2. That the registration of that assignment constituted notice to the mortgagee, and the mortgage did not affect the plaintiff's title or right to possession.

3. That after the plaintiff went away in July, 1888, his father had possession under him as tenant at will, and his tenancy did not terminate until July, 1889, and therefore the Real Property Limitation Act had not barred the plaintiff's right at the time this action was begun in 1898.

4. That the plaintiff, having the equitable title and having the owner of the legal estate before the Court, was entitled to recover possession of the land. *Cope v. Crichton et al.*, 603.

EVIDENCE.

Admissibility—Death of Witness before Cross-examination.—*Held*, upon a review of the authorities, that the depositions of the defendant taken on his own behalf upon a reference were admissible in evidence, notwithstanding that he had died pending an adjournment of the reference, prior to cross-examination, so that the plaintiff had been deprived of the opportunity of cross-examining him. *Randall v. Atkinson*, 242.

Of an Oral Promise made before the Execution of a Written Agreement not Admissible in the Absence of Fraud.—*See* PARENT AND CHILD.

The Provisions of the Criminal Code as to Corroboration refer to the Trial not to the Preliminary Enquiry before the Magistrate.—*See* EXTRA-DITION.

Of Negligence and Contributory Negligence so Interwoven that Con-

tributory Negligence is Proved by Plaintiff's Witnesses and no Conflict in the Facts in Proof, Judge may Withdraw the Question from the Jury and Direct a Nonsuit.—*See* STREET RAILWAYS.

In Libel, Admissibility of to Prove Publication and Inadmissibility of to Prove Further Publication.—*See* LIBEL.

EXECUTION.

Equitable.—*See* RECEIVER, 1.

Priority of, in Respect to a Chattel Mortgage.—*See* CHATTEL MORTGAGE, 2.

See EQUITABLE EXECUTION.

EXECUTORS AND ADMINISTRATORS.

1. *Liability of—Executors of Surviving Executor—Notice for Claims—R. S. O. (1887) ch. 110, sec. 36 (R. S. O. ch. 129, sec. 38)—Requisites—Administration de bonis non—Statute of Limitations.*—A notice by an executor or trustee given under sec. 38, R. S. O. ch. 129, "The Trustee Act," besides calling for claims against the estate, should state that the effect of non-compliance with it will be the exclusion of persons failing to comply therewith from participation in the estate to be divided, and such notice should be published in newspapers in localities where claimants on the estate reside, or in the "Ontario Gazette" if their residence is unknown.

And where the executors of a sole surviving executor of an estate, in giving notice for claims under the statute, omitted to give the proper

notice for claims against the estate of which their testator had been to their knowledge executor, with which they had never intermeddled and of the existence of claims against which they were unaware, they were held liable to the *cestuis que trust*, to whose knowledge the existence of the notice was not shewn to have come, for a fund for which their testator was responsible; and the fact that administration *de bonis non* of the estate of which their testator had been executor was subsequently granted to another person did not under the circumstances of this case affect their liability.

The claim of one of the *cestuis que trust* who was entitled to a life interest in, and who had received the income from the wrongful holder of part of the estate in question, was held barred by the statute of limitations as against the executors, she not having received anything from them for six years—liberty to retain the income of the portion to be made good by them being allowed to the executors, they being liable to certain other *cestuis que trust* having a reversionary interest in the fund, and whose claims were protected from the operation of the statute by sub-sec. (b) of sec. 32 of the Act.

In re Somerset, Somerset v. Earl Poulett, [1894] 1 Ch. 231, followed. *Stewart et al. v. Snyder et al.*, 110.

2. *Setting Apart a Fund—Non-existence of—Fraud of Solicitor—Negligence of Executor—Representation by—Agency of Solicitor—Representations and Payments by—Statute of Limitations.*]—Executors relying upon the word of a solicitor who had managed the testator's affairs in his life-time, procured from him a list of mortgages alleged to

have been taken by the testator, representing a trust fund of \$5,000 set apart by the will for the widow, but without the actual production of the mortgages, and shewed it to her, informing her that the solicitor would pay her the interest. As a matter of fact the mortgages never had any existence, but the solicitor regularly paid her the interest up to the time of his death:—

Held, that the executors had neglected their duty in not setting aside the \$5,000 in money or securities, and that their duty in that respect could not be delegated:—

Held, also, that they had appointed the solicitor their agent for the purpose of paying the interest, and that statements and payments made by him were made in the course of the business for which they had employed him; that each payment was a renewal of the representation that the \$5,000 was still in their hands, invested for her benefit; and they could not be allowed to set up the Statute of Limitation in answer to the plaintiff's claim, or that the statements they made were not true, and that they were liable to make the fund good. *Clark v. Bellamy et al.*, 532.

3. *Life Insurance Policy—Domicil of Insured—Possession of Policy—Assignment—Foreign Administrator—Domestic Administrator—Domestic Insurance Company—Administration—Foreign Creditors—Agreement—Construction.*]—The company, having its head office in Ontario, insured the life of a person then domiciled in Ontario, by two policies, one for \$2,000 and the other for \$3,000, payable to his executors or administrators at his death, at such head office. These policies were assigned by the insured to certain

persons in Ontario, and an agreement in writing was subsequently made between the insured and these persons, by which his indebtedness to them was settled by his giving two promissory notes for \$500 each, and by which it was also provided that the policies should be reassigned to the insured "upon the payment * * of the first of the said \$500 promissory notes, and shall in the meantime be held as collateral security for the payment of the said \$500 note * * and the said (insured) shall be bound to keep up all premiums in the meantime, and if not paid when due, the said premiums may be paid by (the assignees), and the payments so made shall be added to said (insured's) indebtedness, to which said policies shall remain as collateral security therefor."

The insured died in a foreign country, where he had been for some time domiciled, having in his actual possession, at the time of his death, one of the policies.

Letters of administration to his estate were granted by a court in the country where he died to a person there, and also by a Surrogate Court in Ontario to one of the assignees of the policies:—

Held, that, although the locality of a specialty is where it is conspicuous at the time of the death, that means, where it is rightly conspicuous, and, as the assignees were entitled in law to the possession of the policy, it was conspicuous, not where it actually was at the death, but where it rightly ought to have been; and the rule that the locality of a specialty is the jurisdiction in which letters of administration are to be granted is subject to this qualification—if the specialty can be recovered and enforced in the country where it is found at the death; and,

assuming that letters were properly granted by the foreign court, the policy could not have been enforced and the moneys payable thereby recovered in the foreign country, for the insurance company, being as to that country a foreign corporation and not doing business therein, could not be sued there.

The appointment of an administrator in Ontario was, therefore, necessary; and the insurance company having paid the insurance moneys into Court, they should be handed over to that administrator to be administered.

Held, also, that, upon the true construction of the agreement, the assignees were entitled only to the amount of the first one of the promissory notes, with interest from its maturity, and to the amount of the premiums paid by them since the date of the agreement, with interest. *Re Ontario Mutual Life Assurance Co. and Fox et al.*, 666.

Discretion of Executors.] — See RECEIVER.

EXTRADITION.

Private Prosecutor—Authority of Foreign Government—R. S. C. ch. 142—Corroboration.] — It is not necessary that it should appear on the face of extradition proceedings under R. S. C. ch. 142, or otherwise, that the information or complaint against the prisoner was laid or made by or under the authority of the foreign Government; but the extradition Judge may receive the complaint of anyone who, if the alleged offence had been committed in Canada, might have made it.

Canadian enactments and practice in this regard contrasted with those of the United States.

Semble, that if an act criminal according to the laws of both countries be committed, the guilty person can be extradited, although it constitute forgery under the laws of one, and larceny under those of the other, both being extraditable offences.

Semble, also, that the provisions of the Criminal Code as to corroboration (55-56 Vict. ch. 29, sec. 684 (D.)) refer to the trial, and not to the preliminary enquiry before the magistrate. *In re Lazier*, 419.

FOREIGN LAW.

Application of, to Question of Title Raised by a Defence of the Statute of Limitations.—See ACTION.

HABEAS CORPUS.

Issue by Judge of High Court—Non-appeal from Judgment—Res Judicata.—A person confined or restrained of his liberty is now limited to only one writ of *habeas corpus* to be granted by a Judge of the High Court, returnable before himself or before a Judge in Chambers, or before a Divisional Court, with a right of appeal to the Court of Appeal, whose judgment is final; and where no such appeal is taken, the judgment which might have been appealed against become final and conclusive, and may be pleaded as *res judicata*.

Judgment of MACMAHON, J., affirmed. *Taylor v. Scott*, 475.

HUSBAND AND WIFE.

Separate Estate of Wife—Husband's Interest in—Renunciation—Rights of Administrator of Wife's Estate—Evidence of Renunciation—

Construction of Document.—A husband is beneficially entitled to a share in the personal property of his wife, on her decease, because of his marital relationship and right; and in the same way to a share in her land, by virtue of R. S. O. ch. 127, sec. 5. If he renounces this marital right before marriage and in order to it, the law cannot replace him in the benefit out of which he has contracted himself.

And where the husband has so renounced, he is not entitled to administration of his wife's estate, for administration follows interest.

The administrator of the wife's estate has a status to set up the husband's renunciation in answer to a claim made by him to a share in the estate.

The husband, before marriage, signed a writing as follows:—"This is to certify that I, H. D., through marriage to A. E. T., will not assert any right or claim to the property of the said A. E. T., either real estate, cash in bank, household or personal effects?"—

Held, that this was to be read as an abandonment of any right or claim in the property which might accrue to him through his intended marriage and was sufficient to protect her estate from any claim of his, after the separate use of the property, to which she was entitled under the Married Women's Act in force at the date of the marriage, 1894, ceased by her death in 1896. *Dorsey et al. v. Dorsey*, 183.

INJUNCTION.

1. *Letters—Stenographic Notes of—Property in—Stenographer—Implied Contract—Breach—Publication—Public Interest.*—Documents con-

sisting of notes or drafts of private letters dictated by a member of a firm of solicitors to a stenographer in the course of business in the office were surreptitiously taken by him and given to another person who, knowing how they had been obtained, proposed to publish them and to use them as evidence in a criminal prosecution or parliamentary inquiry he alleged he intended to bring about, although they contained nothing which could have been used as evidence against anyone:—

Held, that the property in the documents was in the plaintiffs and their possession having been obtained by a breach of contract the plaintiffs were entitled to a perpetual injunction restraining their publication. *Laidlaw et al. v. Lear et al.*, 26.

2. *County Courts — Injury or Threatened Injury to Goods—Specific Damages.*]—Under the Judicature Act, R. S. O. ch. 51, sec. 57, sub-sec. 4, and the County Courts Act, R. S. O. ch. 55, sec. 23, sub-sec. 11, when a cause of action is within the jurisdiction of a County Court, an injunction may in a proper case be granted to restrain an apprehended wrong, and a declaration of right may be made in a case whether substantive relief is sought or not in as full and ample a manner as in a case in the High Court. A threatened sale of a specific chattel which, if carried out, could have been compensated in damages, is not a proper case in which to grant an injunction restraining the sale.

Judgment of the County Court of Peel reversed. *Bradley v. Barber et al.*, 443.

INSURANCE.

See LIFE INSURANCE.

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INTOXICATING LIQUORS.

1. *Liquor License Act—Mandamus—Notice of Action—Rescission of Grant of License—Discretion.*]—An action for a mandamus to compel license inspectors and license commissioners to perform their respective duties, and for damages as subsidiary relief, is not within the terms of R. S. O. ch. 88, "An Act to protect Justices of the Peace and others from Vexatious Actions," and no notice of action is necessary.

In an action to enforce the issue of a license which, by resolution of the commissioners, had been granted to the plaintiff, but which resolution was afterwards rescinded in order to grant the license to a subsequent applicant:—

Held, that the license commissioners appointed under the Liquor License Act have, in the exercise of their functions, a wide discretion; but it must be exercised judicially, and the Court has power to compel them to so exercise it; that the commissioners were not acting judicially, but unfairly and contrary to the spirit and intent of the Act, in rescinding their resolution in order to grant a license to a subsequent applicant; but, as such license had been issued to him and the ordering of the issue of a license to the plaintiff would be ordering the issue of a license in excess of the number limited by law, no relief could be granted, and the action was dismissed, but without costs.

Leeson v. The Board of License Commissioners of the County of Dufferin (1890), 19 O. R. 67, not followed. *Haslem v. Schnarr et al.*, 89.

2. *Liquor License Act—Dominion Licenses—Wholesale License—Sale in License District to Unlicensed*

Persons—*R. S. O. ch. 245, secs. 34, 51.*—A brewing company, holding the Dominion License referred to in sec. 51, sub-sec. 1, of the Liquor License Act, *R. S. O. ch. 245*, and also a Provincial wholesale license, as defined by sub-sec. 4 of sec. 2 of that Act, sold through their manager, liquor in wholesale quantities to an unlicensed person in the district in which they had obtained their Provincial wholesale license :—

Held, that the sale was authorized under sub-sec. 3 of sec. 51 of the Act; and that it was not requisite for the company to take out another wholesale license in the form issuable under section 34. *Regina v. Guitard*, 283.

3. *Liquor License Act, R. S. O. ch. 245, sec. 124*—*Conviction Under—Sale to Inebriate—Order Forbidding—Requisites of.*—The defendant, a licensed tavern keeper in the city of C., in the county of K., was convicted under sec. 124 of the Liquor License Act, *R. S. O. ch. 245*, of selling liquor at a specified time and place to a certain person, "knowing that the sale of liquor to the said J. H., a drunkard, was prohibited by an order in open Court," made by the convicting magistrate.

Upon this conviction being removed by *certiorari*, the "order" returned was a memorandum signed by the magistrate, as follows: "I make an order forbidding any licensed person giving liquor to J. H., in the county of K., for one year."

It did not appear where and in what circumstances this was made: whether in open Court; whether after summons to J. H.; whether excessive use of liquor by him was proved or admitted—or not :—

Held, that the conviction was bad,

and there was nothing in the evidence by which it could be amended.

Semble, *ROBERTSON, J.*, dissenting, that if there were a proper order brought to the knowledge of the defendant, there would be a violation of the law in making a sale to the inebriate, though the liquor was given to and actually drunk by other persons on the licensed premises. *Regina v. Mount*, 303.

JUDICATURE ACT.

R. S. O. CH. 51.

See INJUNCTION, 2.

JUDGMENT.

Jurisdiction of Judge in Division Court to Refuse to Discharge a Garnished Debt before Payment by Garnishee, but after Judgment Recovered Against Him, after Assignment for Benefit of Creditors by Primary Debtor.—*See DIVISION COURTS, 2.*

JURISDICTION.

Of County Court Judge as to Assessment in Local Improvement Matters.—*See MUNICIPAL CORPORATIONS, 2.*

Of Division Court Judge to Grant Leave to File a Notice Disputing the Jurisdiction of the Court after the Expiry of the Time Limited.—*See DIVISION COURTS.*

Of County Court as to Injunction.—*See INJUNCTION, 2.*

Of Division Court Judge under R. S. O. ch. 60, sec. 200, to Discharge

from Attachment a Garnished Debt after Judgment.]—See DIVISION COURTS, 2.

As to Foreign Lands.]—See ACTION.

JURY.

Recalling of, and Withdrawing Judge's Comment.]—See CRIMINAL LAW.

Withdrawal of Question of Negligence from, and a Non-suit Directed.]—See STREET RAILWAYS.

On Disagreement, Power of Judge to Dismiss Action.]—See TRIAL.

LANDLORD AND TENANT.

1. Assignment for the Benefit of Creditors—Future Rent—Preferential Lien—Acceleration Clause—*R. S. O. ch. 170, sec. 34.*]—A lease, under which the rent was payable quarterly in advance, contained a provision that if the lessee should make an assignment for the benefit of creditors, the then current and next ensuing quarter's rent and the current year's taxes should immediately become due and payable as rent in arrear, and recoverable as such :—

Held, on the lessee making such an assignment, that the lessor was entitled to recover by distress and had a preferential lien for—in addition to a quarter's rent due and in arrear for the quarter preceding the making of the assignment—the rent of the current quarter in which the assignment was made, which was also due and in arrear as well as a further quarter's rent, together with the taxes for the current year.

Langley v. Meir (1898), 25 A.R. 372, commented on; *Lazier v. Henderson* (1898), 29 O. R. 673, followed. *Tew v. The Toronto Savings and Loan Company*, 76.

2. Creation of New Term by Overholding—Delivery of Keys—Continued Occupation of Part of Premises—Use and Occupation—Evidence of Value.]—Upon the expiry of a parol lease for a term certain, with an option in the lessees to renew for a fixed period, the facts that the keys of the demised premises were not delivered by the lessees to the lessor for two or three days after the expiry of the term, and that a sub-tenant of the lessees continued thereafter in possession of a portion of the premises, are not sufficient to constitute an exercise by the lessees of their option to renew. Such possession of the sub-tenant is, however, sufficient to make the lessees liable for use and occupation, as to which the rent payable under the lease which has expired may be some evidence of the value of the premises, although no particular contract is to be inferred from the mere fact of holding over. *Lindsay v. Robertson et al.*, 229.

3. Lease for Term of Years—Provision for Sale of Land—Illegal Entry by Purchaser—Trespass—Incoming Tenant.]—In a lease of a farm for five years, containing a covenant by the lessor for quiet enjoyment, the lessee agreed that if the place were sold, and he should receive one month's notice prior to the expiration of any year, he would give up peaceable possession and allow any incoming tenant to plough the land after harvest. Before the expiration of the lease the place was sold and conveyed to a purchaser and an

assignment of the lease made to him. In the fall of the year, after the purchase, and before the lessee had harvested his crop, the purchaser entered on the land and ploughed it up thereby causing injury to the lessee :—

Held, that the purchaser was a “tenant” within the meaning of the covenant as to an incoming tenant, but that he had no right to enter on the property before the plaintiff had harvested his crop, and was a trespasser and liable for damages caused thereby.

Held, also, that no liability was imposed on the lessor under the covenant for quiet enjoyment. *Newell v. Magee*, 550.

LIBEL.

Privilege—Protection of Interests—Excessive Language—Evidence—Admissibility—Publication—Receipt of Letter—Further Publication—Non-direction—Damages.—The defendant received a letter from the solicitor of the plaintiff’s mother complaining of statements circulated by the defendant which had caused the mother and her family, and particularly her daughter the plaintiff, annoyance, and threatening to begin an action for slander unless a retraction were signed and costs paid. This letter was not answered by the defendant, but the threatened action having been brought, the defendant wrote a letter to the plaintiff’s mother, with the avowed purpose of preventing her from proceeding with her action. In that letter he referred to the plaintiff, and said he saw her drive her father out of the house and pelt him with sticks of wood, and asked the mother if she thought it would add to her daugh-

ter’s character to have this and much more published in Court and in newspapers :—

Held, in an action for libel based upon this letter, that it did not come within the rule as to “statements necessary to protect the defendant’s interests” so as to make the occasion privileged; and even if it did, the privilege was destroyed by the excess of the language.

Evidence was given by a woman who said that she saw the defendant’s letter in the hands of the plaintiff’s mother within twenty minutes after its receipt, and that she read it aloud in the presence of the plaintiff and her mother and several other persons. There was also evidence to shew that the letter had been posted and given out by the postmaster to the plaintiff’s mother :—

Held, that had the evidence of the woman been offered in order to fix the defendant with liability for what was done as a further publication of the letter, it would not have been admissible, but it was admissible in order to prove publication by the defendant, which was denied, as it shewed that the letter was in the possession of the person to whom it was addressed shortly after it was posted by the defendant, and therefore was evidence of the receipt of it by her. It may not have been necessary to give the evidence, but the plaintiff had the right to do so.

Held, also, that it was not a ground for interfering with the verdict of the jury in favour of the plaintiff, that the trial Judge refused to tell the jury that the defendant was not responsible for the further publication of the letter made by the plaintiff or her mother, the jury not having been invited to increase the damages by reason of publication to

others, and the damages awarded not being excessive. *Annie Benner v. Edmonds*, 676.

LICENSE.

To Sell Liquor, Dominion and Provincial.]—See INTOXICATING LIQUORS, 2.

LICENSE COMMISSIONERS.

Discretion of, Must be Exercised Judicially, and the Court may Compel them to so Exercise it.]—See INTOXICATING LIQUORS, 1.

LICENSE INSPECTORS.

See INTOXICATING LIQUORS, 1.

LIEN.

Preferential, for Rent, When Assignment for Benefit of Creditors Made.]—See LANDLORD AND TENANT, 1.

LIFE INSURANCE.

1. *Benefit of Wives and Children — Apportionment — Will — Abatement.*]—A testator had three policies upon his life, each for \$2,000, payable to his wife and children; and, had no change been made, they would have been entitled to the whole sum in equal shares. By his will he gave a specific portion of the \$6,000 to each of eight of his nine children, some of the portions being more and some less than \$600, the total given being \$5,100; but said nothing as to his wife or remaining child.

By sec. 160 of the Ontario Insurance Act, he had power to "make or alter the apportionment:"—

Held, that what he did by his will was a reapportionment; and the former apportionment remained, except in so far as it was changed by the reapportionment. Had the policies all been good, each of the eight children would have been entitled to the specific sum given him or her by the will, and the wife and the remaining child would have been entitled, by virtue of the original apportionment in their favour, varied by the reapportionment, to the \$900 balance, divided between them equally. But, as one of the policies turned out to be worthless, and there was only \$4,000 to distribute, the sum going to each of the beneficiaries must abate in due proportion. *Re Carbery*, 40.

2. *Benefit Society—Total Disability — Non-payment of Assessments after Claim Made — Forfeiture — Vested Right*—55 Vict. ch. 39, sec. 42 (O.)—*Application of, to Contract — Novation — Determination of Disability — Directors of Association — Effect of Winding-up Order.*]—Certificates of life insurance issued by a benefit society provided that in case of total disability, one-half the amount of the insurance should be payable to the insured. This was subject to the following conditions, among others:—

"3. If the assured shall, at any time within thirty days after receiving due notice, fail to pay * * the assessments * * then * * the association shall not be liable for payment of any sum whatever, and this certificate shall cease and determine."

"7. In every case when this certificate shall cease and determine

* * all payments thereon shall be forfeited to the association * * .”

A call was made by the association on the 1st March, 1897, payable on the 1st April, and notice given to T., who was then a member in good standing; on the 10th March he made a claim for total disability; and made default in paying the call on the 1st April. Further notice was given him by letter of the 9th April, by which he was to pay in fifteen days, but he failed to do so; and afterwards, upon a reference for the winding-up of the company, sought to prove a claim:—

Held, that he was not entitled.

B. made a claim for total disability on the 18th February, 1897, and put in the usual proofs, but no response was made by the association. He paid the call due on the 1st April, and no further call was made till the 1st June:—

Held, that his right of action vested before any subsequent call was made, and it was not essential for him to continue his membership after default arose on the part of the association to pay his claim; and therefore there was no bar to his establishing his claim upon the reference.

Default of the association arose after sixty days from the furnishing by B. of proofs of total disability; for sec. 42 of 55 Vict. ch. 39 (O.) applied to the contract, there having been a novation, after the passing of that Act, of the original insurance contract, which was made in 1885.

Another certificate issued by the association provided that in the event of the insured becoming totally and permanently disabled, and the determining of such disability by the medical director and board of directors of the association, there should be paid to the member, at the option

of the board, if he should so request in writing at any time while the policy was in full force, upon the surrender to the association and the cancellation of the certificate, in full discharge and settlement of all claims under the contract, one-half of the amount of the insurance.

Under this a claim for total disability was made after an order for the winding-up of the society:—

Held, that the effect of the order was to destroy the functions of the directors and officers and practically to determine the contract; and as the conditions upon which the total disability benefit was to become payable were impossible of fulfilment, the claimant was not entitled to prove in the winding-up proceedings; but the denial of his claim was to be without prejudice to his proving for damages or otherwise on his policy. *Re Massachusetts Benefit Life Association. Junkin's Case. Babcock's Case. Palframan's Case (and others)*, 309.

3. *Benefit Certificate—Wife and Children—Reapportionment by Will—Revocation of Trust—Validity.*]

By the rules of a benefit society the money secured by certificate was payable upon the death of a member to his widow and children, but in this case the member, by a codicil to his will, made shortly before his death, which occurred in October, 1886, directed that the moneys payable upon his certificate, which was issued in February, 1884, should be used by his widow to pay off the mortgage upon his farm. The money was paid to the widow, and she used it as directed, giving the plaintiff, a daughter of the deceased, the benefit of maintenance on the farm, until she married, at the age of nineteen. The plaintiff claimed her share,

alleging a trust in her favour which could not be revoked by the codicil :—

Held, following *Videan v. Westover* (1897), 29 O. R. 1, that the provision made by the codicil was a reapportionment of the fund, which the deceased had power to make. *Racher v. Pew et al.*, 483.

4. *Death of Children*—*R. S. O. 1887 ch. 136*—*Re-apportionment*—*Will*—*Grandchildren*—*Cancellation and Re-issue of Policies*—60 *Vict. ch. 36 (O.)*—*Creditors.*—Judgment of MEREDITH, J., 29 O. R. 593, affirmed. *McIntyre v. Silcox et al.*, 488.

5. “*Preferred Beneficiaries*”—*R. S. O. ch. 203*—*Will*—*General Devise*—*Apportionment*—*After Acquired Policy.*—A devise by a testator of all his life insurance policies in favour of “preferred beneficiaries” as defined by the Ontario Insurance Act, *R. S. O. ch. 203*, is sufficient under section 160 of the Act to vary a policy or declaration or apportionment previously made without specifically identifying the policies by number, name, date, or amount insured.

Such a devise does not affect a policy issued after the date of the will.

Re Lynn (1891), 20 O. R. 475, and *McKibbin v. Feegan* (1893), 21 A. R. 87, commented on. *Re Cheesborough*, 639.

6. *Insurance by Wife in Husband's Name*—*Ratification*—*Name of Beneficiaries not Inserted in Policy*—*Incorporation of Application*—*Insurable Interest of Mother in Life of Child*—14 *Geo. III. ch. 48, secs. 1 & 2*—*R. S. O. ch. 203, sec. 150, sub-sec. 1.*—Where a policy of in-

surance was effected by a wife in her husband's name without his knowledge or consent, contrary to the rule of the insurance company, but subsequently, and after acquiring such knowledge, the husband procured two other policies to be issued in his name in the same company, signing the applications therefor, and acquiescing in the payment of the premiums on the three policies, and on these policies lapsing for default in payment of the premiums he revived the first policy, he was held estopped from denying its validity.

Where the name of a person interested in a policy of insurance is not inserted therein, but is set out in the application therefor, which is made part of the policy and incorporated therewith, it is sufficient under 14 *Geo. III. ch. 48, secs. 1 & 2*, and *R. S. O. ch. 203, sec. 150 (1)*.

An insurance in a New York company, effected by a mother on the life of her child under age, is valid, whether governed by the Ontario or New York law, the *R. S. O. ch. 203, sec. 150, sub-sec. 5*, making such insurance valid in Ontario, whether effected before or after the passing of that Act; while the American decisions, referred to in the case, shew its validity according to the law of the State of New York. *Wakeman v. The Metropolitan Life Insurance Company*, 705.

7. *Transfer of Business*—*New Contract*—*Validity of*—*Misrepresentation as to Age*—*Effect of*—*Dominion License*—*Registration in Ontario*—55 *Vict. ch. 39, sec. 34 (O.)*—*Pedigree.*—A Canadian benefit association, in which the assured held certificates of insurance, transferred its assets and business to an

American association, who issued new certificates, sealed with its seal and signed in the United States by the president and treasurer, which were sent to, but were not to be operative until countersigned by, the Canadian agent, and delivered to the insured on payment of the premiums, all of which was done.

The claimants sought to prove claims on the certificates in winding-up proceedings, and the Master found on the evidence, in one case consisting partly of an entry in an alleged family Bible containing a record of births, that misrepresentations as to age had been made in both cases by the assured and disallowed the claims, and that as the contracts had been made with a friendly society previous to the passing of 55 Vict. ch. 39 (O.), The Insurance Corporations Act, 1892, the claimants were not entitled to the benefit of section 34 of that Act, under which misstatements as to age made in good faith do not avoid the contract, and, following *Cerri v. Ancient Order of Forresters* (1898), 25 A. R. 22, the misrepresentation being material was fatal to the contracts:—

Held, on appeal, that there was a novation and a new contract between the American association and the assured, which came into existence after the above Act came into force, as the association were validly doing business in Canada by license under sec. 39 of R. S. C. ch. 124: that the contract being completed in Canada was subject to statutory conditions imposed for the benefit of the public, and that the claimants were entitled to the benefit of secs. 33 & 34 of 55 Vict. ch. 39 (O.). *Mason v. The Massachusetts Benefit Life Association. Allen's Case. O'Dea's Case*, 716.

LIMITATION OF ACTIONS.

Claim to Realty—Future Estate—Deed of Appointment—Accrual of Right—R. S. O. ch. 133, sec. 5, sub-sec. 11.—On the 25th October, 1870, the plaintiffs' testator purchased certain lands and procured a deed to be made to the grantees named therein to hold to such uses as he should by deed or will appoint, and in default of such appointment, and, so far as such appointment should not extend, to the use of the said grantees, their heirs and assigns. He put his mother in possession of the land, and she so continued up to the time of her death, which occurred on the 21st July, 1878, the defendants, her two daughters, residing with her, and after her death continuing to reside on the land, and remaining in possession until action brought. On 1st November, 1892, the plaintiffs' testator in the alleged exercise of the power of appointment, executed a deed appointing and conveying the lands to another person who then reconveyed to him. He subsequently died, having devised the property to the plaintiffs, and on the 19th March, 1897, an action to recover possession was brought by them:—

Held, that the effect of the deed of the 25th October, 1870, was to vest the fee simple in the lands in the grantees to uses subject to be divested on the exercise of the power of appointment, and that the deed of 1st November, 1892, was a due execution thereof; that the testator's estate, prior to the appointment, was a future estate or interest within the meaning of sec. 5, sub-sec. 11, of the Real Property Limitation Act, R. S. O. (1897) ch. 133, which came into possession on the execution of the deed of 1st November, 1892, and that plaintiffs not being barred by

effluxion of time were entitled to recover. *Thuresson et al. v. Thuresson*, 504.

See EXECUTORS AND ADMINISTRATORS, 2

LIQUOR LICENSE ACT.

See INTOXICATING LIQUORS.

LOCAL IMPROVEMENTS.

See MUNICIPAL CORPORATIONS, 2.

MAGISTRATE.

Order of, Prohibiting Sale of Liquor to a Drunkard.—See INTOXICATING LIQUORS, 3.

MAINTENANCE.

Of Children, no Legal Obligation on Parent.—See PARENT AND CHILD.

MANDAMUS.

Municipal Corporation—Unnecessary Relief—Farm Lands—Assessment of—Exemption—By-law—R. S. O. ch. 224, sec. 8, sub-sec. 2.—A writ of mandamus will not be granted when if issued it would be unavailing, or where there is no necessity for the relief.

When it appeared on the evidence that certain farm lands were not charged or assessed for any of the purposes mentioned in sub-sec. 2 of sec. 8, ch. 224 R. S. O., a mandamus directed to the reeve and councillors of a village to pass a by-law declar-

ing what part of the farm lands should be exempt or partly exempt from taxation for such expenditure was refused.

Judgment of ARMOUR, C. J., reversed. *Re Giles v. The Corporation of the Village of Wellington*, 610.

MARKET.

Regulation of by By-law.—See MUNICIPAL CORPORATIONS, 1.

MARRIAGE SETTLEMENT.

See SETTLEMENT.

MISTAKE.

Assessment and Taxes—Payment of Current Taxes in Ignorance of Prior Sale for Arrears—Action to Recover.—Land belonging to a trust estate having been sold for taxes, during the year allowed for redemption the trustees who had been newly appointed paid the taxes for the current year in ignorance of the sale, and subsequently on learning the fact decided not to redeem as the arrears exceeded the value of the land :—

Held, that they were not entitled to recover back the money as paid under a mistake of fact. *The Trusts Corporation of Ontario v. The Corporation of the City of Toronto*, 209.

In Name of Grantee in Mortgage.—See DEED.

In Name of Donee in Will.—See WILL, 6.

MORTGAGE.

1. *Consolidation—Derivative Mortgage—Redemption.*]—The plaintiff as mortgagee of land of which the defendant was the owner of the equity of redemption, was also derivative mortgagee from the latter of other lands:—

Held, that the plaintiff was entitled to consolidate his claims in an action of foreclosure:—

Held, also, that the plaintiff might foreclose the original mortgage, without making the original mortgagor a party. *Silverthorn v. Glazebrook*, 408.

2. *Purchaser of Equity of Redemption—Indemnity—Death of Mortgagor—Insolvent Estate—Administrator—Release.*]—Where the mortgagor is dead and his estate is insolvent, the mortgagee cannot compel the administrator of the estate to seek indemnity from one who purchased the mortgaged estate from the mortgagor subject to the mortgage, nor is the administrator responsible in damages to the mortgagee for having released the purchaser from liability. *Higgins v. Trusts Corporation of Ontario et al.*, 684.

By Executors and Administrators for Purposes of Estate, Change in Personel of Trustees, Subsequent Variation of Terms of Mortgage, Release of Former Trustee.]—See **PRINCIPAL AND SURETY**, 2.

MORTGAGOR AND MORTGAGEE.

Mortgagee for Bondholders.]—See **ARBITRATION AND AWARD**, 2.

Foreclosure of Derivative Mortgage Without Making Original Mortgagor a Party.]—See **MORTGAGE**.

Mistake in Name of Mortgagee.]—See **DEED**.

MUNICIPAL CORPORATIONS.

1. *By-law — Auctioneer—"Regulating and Governing"—Prohibiting—Markets—Regulation of.*]—The power to regulate and govern auctioneers and other persons conferred on municipal councils by sub-sec. 2 of sec. 495 ch. 184 R. S. O. (1887), did not give power to prohibit the exercise of any lawful calling, and a by-law which prohibits an auctioneer from exercising his calling cannot be supported under that subsection as amended by 56 Vict. ch. 35, sec. 19 (O.), and 57 Vict. ch. 50, sec. 8 (O.).

The power given by sub-sec. 2 of sec. 503 to pass by-laws "For regulating all markets established and to be established," gives no implied power to prevent an auctioneer exercising his calling in the markets, but he may be prevented from selling therein any commodities except those for the sale of which the markets were established.

Judgment of **MACMAHON, J.**, reversed. *Bollander v. The Corporation of the City of Ottawa et al.*, 7.

2. *Local Improvements—Frontage System—Assessment—Benefit—Appeal—Court of Revision—County Court Judge—Prohibition—R. S. O. ch. 223, secs. 664-685.*]—The municipality in 1894 by by-law adopted the local improvement system as to the making of sewers, and also passed a general by-law for the purposes mentioned in sub-sec. 1 of sec. 612 of the Municipal Act then in force, 55 Vict. ch. 42 (O.).

The appellant's lands fronting on a street along which the municipality

proposed to make a sewer, were, with the other lands so fronting, assessed at a uniform rate per foot frontage, for a portion of the cost of the sewer, and certain lands not fronting on the street, but which would derive benefit from the sewer, were assessed for the remainder of the cost.

The appellant appealed against his assessment to the Court of Revision, but his appeal was dismissed, and he then appealed to the County Court Judge, who found that the lands in question would be benefited by the proposed sewer, but that the assessment was too high, and he reduced it, directing that the amount struck off should be assessed *pro rata* over the other properties included in the assessment:—

Held, that he had no jurisdiction to do so; and prohibition awarded against the enforcement of his order.

Having regard to the provisions of the Municipal Act, R. S. O. ch. 223, secs. 664-685, relating to local improvements, the method of assessment, in such a case as this, is to determine what proportion of the cost the land fronting on the street shall bear, and what proportion the land not so fronting shall bear, and assess the proportion appertaining to each class according to its frontage, and not according to the proportion of benefit received by each parcel or lot of land.

History and construction of the legislation. *Re Robertson and City of Chatham*, 158.

3. *Offences against By-Laws—Summons against Company—Service*—R. S. O. ch. 223, secs. 704, 705—*Criminal Code*, 1892, secs. 562, 853, 858.]—Section 705 of the Municipal Act, R. S. O. ch. 223, as to summary prosecution before a justice

of the peace for offences against municipal by-laws applies to incorporated companies as well as to individuals, as do also sections 562, 853, and 858 of the Criminal Code, 1892, as to service of summonses.

Decision of ROSE, J., affirmed. *In re The Queen v. The Toronto Railway Company*, 214.

4. *By-law Contracting Debt—Publication of—Blank Dates in—Debentures—Interest—Form of By-law—Description of Property Taken—Necessity for Prior Expropriation By-law—Discretion.*]—It is not essential to the validity of a municipal by-law creating a debt, that a day certain for its coming into force should be stated therein when published and submitted to the ratepayers, as sec. 384, sub-sec. 2 of the Municipal Act, R. S. O. ch. 223, provides that if no day is named it shall take effect on the day of the passing thereof.

Where such a by-law as passed declared the time required by law within which the principal and interest of the debentures should be payable, but the dates of payment were left blank in the copy of the by-law as published, the Court, in the exercise of its discretion, refused to quash the by-law, which was legal on its face.

It is no objection to such a by-law that the enacting clause omits to settle certain specific sums for the payment of the debt and the interest, where the recital and enacting clause read together make clear what is to be done.

But where a by-law was passed to raise money to pay for the opening of a street without any settled plan, shewing the exact position of the intended street, or of the land to be taken, or of the cost of the expropri-

ation, and without a by-law being passed providing for the expropriation of the lands, the Court under the circumstances quashed the by-law with costs. *Re Caldwell and The Corporation of the Town of Galt*, 379.

5. *Police Commissioners—Second-hand Shops and Junk Stores—By-law Prohibiting Dealing with Minors—R. S. O. ch. 223, sec. 484.*—*R. S. O. (1887) ch. 184, sec. 436 (R. S. O. ch. 223, sec. 484)*, which provides that "The Board of Commissioners of Police shall in cities license and regulate second-hand shops and junk stores," does not authorize a by-law to the effect that "no keeper of a second-hand store and junk store shall receive, purchase or exchange any goods, articles or things from any person who appears to be under the age of eighteen years."

Such a by-law is bad as partial and unequal in its operation as between different classes, and involving oppressive or gratuitous interference with the rights of those subject to it without reasonable justification. *Regina v. Levy*, 403.

6. *By-laws—Meeting of Council—Notice of—Notice of Introduction of By-laws—Reading By-laws—Adjournment of Meeting—Quashing By-laws—Discretion.*—The notice calling a special meeting of the municipal council of a city at which two by-laws were passed regarding the number of tavern and shop licenses to be granted in the municipality, stated that it was "for the consideration of a by-law relating to tavern licenses :"—

Held, a sufficient notice.

Remarks of CHITTY, J., in *Hender-*

son v. Bank of Australasia (1890), 45 Ch. D. at p. 337, referred to.

It was objected that notice of intention to introduce the by-laws should have been given, and that they should not have received their three readings in one day, the council's rules of proceeding so providing, with the exception of cases of urgency :—

Held, that these were matters of internal regulation, and subject to the decision of the mayor or chairman of the council, and the only appellate tribunal was the council.

The Municipal Act provides, sec. 275, that "every council may adjourn its meetings from time to time :"—

Held, that a meeting of the council might adjourn temporarily, without a formal motion to adjourn, by the consent of the majority of a quorum present; and, even if the adjournment in this case, announced by the mayor, was not by the consent of the majority, the validity of an objection grounded on the absence of such consent would be so doubtful that the Court should not, in its discretion, quash the by-laws passed after the adjournment. *Re Jones and City of London*, 583.

7. *By-law—Invalidity of—"Transient Traders"—Occupation of Premises—Quashing Conviction.*—A by-law of a city provided that "No person not entered upon the assessment roll * * or who may be entered for the first time in the said assessment roll * * and who at the time of commencing business * * has not resided continuously in said city * * at least three months shall commence business * * for the sale of goods or merchandise * * until such person has paid * * the sum of * * by way of license :"—

Held, that the statute under which the by-law was framed, R. S. O. ch. 223, sec. 583, sub-secs. 30 and 31, relates to transient traders *who occupy premises* in a municipality, and that clause (b) of sub-sec. 31 defining the term "transient traders" does not modify the provision as to occupation, and that the by-law was defective and invalid in being directed merely against persons not entered upon the assessment roll and who had resided continuously for three months in the municipality, and was silent as to these persons being in occupation of premises.

Conviction quashed. *Regina v. Applebe*, 623.

Responsibility of, for Acts of Officers in Illegally Placing Arrears of Taxes on Collectors' Roll and Subsequent Distress Therefor.]—See ASSESSMENT AND TAXES, 1.

MUNICIPAL ELECTIONS.

Nomination of Candidate—Keeping Open Poll after Lapse of Hour—Municipal Act, R. S. O. ch. 223, sec. 128.]—The provision in sub-sec. 2 of sec. 128 of the Municipal Act, R. S. O. 223, which provides for the closing of the meeting for the nomination of candidates for municipal offices after the lapse of one hour only applies where no more than one candidate is proposed; sub-section 3 applying where more than one candidate is proposed, in which case no time limit is imposed. *Re E. J. Parke, Police Magistrate of the City of London*, 498.

NOTICE.

By Executors for Claims, Requisites of.]—See EXECUTORS AND ADMINISTRATORS, 2.

Of Special Meeting of a Municipal Corporation to Consider a By-law, Sufficiency of.]—See MUNICIPAL CORPORATIONS, 6.

NOTICE OF ACTION.

License Inspectors and License Commissioners, not Entitled to, in Action for Mandamus to Compel Performance of their Respective Duties.]—See INTOXICATING LIQUORS, 1.

OATH.

Proper Administration of.]—See CRIMINAL LAW.

PARENT AND CHILD.

Obligation to Support—Transfer of Right—Written Agreement—Evidence of Oral Variations.]—At common law there is no legal obligation on the part of a parent to maintain his children: the duty is only a moral one. A father, after the death of his wife, agreed in writing with her mother that she should, at her sole expense, have the custody, maintenance and education of his children in consideration of his renouncing his rights thereto and of other considerations:—

Held, that he could transfer his rights as a parent and, in the absence of fraud, evidence of an oral promise by him before the execution of the agreement that he would pay for the maintenance of the children was inadmissible. *Wright v. McCabe*, 390.

PAYMENT.

Of Taxes under a Mistake After Land Sold for Taxes.]—See MISTAKE.

PENAL ACTIONS AND PENALTIES.

Provincial Election — Inadvertently Spoiled Ballot Paper—R. S. O. ch. 9, sec. 109—"Conveniently"—Deputy Returning Officer—Shewing Ballot Paper and Refusing to Give New One—Breach of Duty—Damages.—The word "conveniently" in section 109 of R. S. O. ch. 9, The Ontario Election Act, means "conveniently for the voter and for his wish, purpose and intention in voting."

The plaintiff, an elector, in marking his ballot at an election of a member to serve in the Legislative Assembly of Ontario inadvertently marked it for the candidate against whom he intended to vote. He immediately and before he had left the apartment at the polling place set apart for marking ballots informed the defendant, the deputy returning officer, of his mistake, and asked for another ballot paper. The defendant said he must first see the marked ballot paper, which the plaintiff refused to allow, but, on the scrutineer for his party recommending him to do so, he handed it to the defendant, without creasing or folding it that it might be placed in the ballot box, in such a way that those present could not see how it was marked. The defendant looked at it, and then either shewed or placed it so that it could be and was seen by nearly all present, and contending that it was not a spoiled ballot, contrary to the plaintiff's protest, placed it in the ballot box, and it was counted for the person against whom the plaintiff intended to vote:—

Held, that the defendant by his acts in disclosing how the plaintiff marked his ballot paper, in not cancelling it, and in refusing to give

the plaintiff another ballot paper on his demanding one, and by his action compelling him to vote for the candidate whom he wished to oppose, was thereby guilty of breaches of duty which entitled the plaintiff to judgment in his favour for the penalties under the statute. *Hastings v. Summerfeldt*, 577.

POLICE COMMISSIONERS.

Regulation of Second-hand Shops and Junk Stores by.—See MUNICIPAL CORPORATIONS, 5.

POSSESSION.

By Sub-tenant, after Expiry of Lease, Effect of.—See LANDLORD AND TENANT, 2.

Of Insurance Policy.—See EXECUTORS AND ADMINISTRATORS, 3.

POWERS.

Of Appointment.—See WILL, 3-7.

PRESCRIPTION.

Right by, to Use of Water.—See WATERS AND WATERCOURSES.

PRINCIPAL AND SURETY.

1. *Judgment against Principal—Proof Required against Surety and Third Party—Administration Bond.*—The plaintiff having an unsatisfied judgment against the administratrix of an estate, procured an assignment of the administration bond and brought an action thereon against

the sureties, when a person, who had indemnified the sureties was made a third party under an order whereby the question of the indemnity was to be tried after the trial of the action, as the Judge might direct, with the liberty to appear by counsel and defend the action and to call and cross-examine witnesses, and it was also ordered that he should not thereafter be at liberty to dispute the defendant's liability, if any, to the plaintiff. At the trial the judgment was put in and one of the defendants called as a witness, who stated that the amount of the judgment was correct. It was objected on behalf of the third party that the liability had not been properly proven as against him, and there should be a reference to ascertain and determine the defendant's liability which was refused and judgment entered for the plaintiff:—

Held, that the judgment so recovered was not sufficient to bind the third party, and a new trial was directed. *Zimmerman v. Kemp*, 465.

2. *Mortgage—Variation of Contract—Giving Time—Novation—Discharge of Surety.*—A mortgage of leasehold lands to secure \$5,000 made by three trustees and executors under a will recited their appointment, and that the moneys were required for the purpose of the estate, the mortgage being under the Short Form Act, and containing the usual covenant for payment by mortgagors. In 1888, under the provision therefor in the will, a new executor and trustee was appointed, the retiring one of the original three being released, and all his interest vested in his successor and those remaining. In 1892, while \$3,000 still remained due, the security being greatly diminished in value,

and worth no more than the amount then due on it, the plaintiffs, with a full knowledge of all the facts, entered into an agreement under seal with the then executors and trustees for an extension of the time for payment of the principal, which though providing for a reduction of the rate of interest, also provided for its being compounded, and that the rate was to apply as well before as after maturity. The agreement contained a covenant by the then executors and trustees to pay the mortgage money, and also a proviso that the extension was consented to in as far as the company might do so without infringing on or in any way affecting the interests of other parties in the mortgaged premises, all rights and remedies against any security or securities the company might have against any third person or persons upon the original security being reserved:—

Held, that the agreement to extend the mortgage was in effect a transaction for a new loan on different and more onerous terms, and that as between the executors and trustees, as last constituted, and the one who had retired the relationship of principal and surety was created, and, by virtue of the agreement, notwithstanding the reservation of remedies the surety was discharged. *Canada Permanent Loan and Savings Company v. Ball et al.*, 557.

Agreement of Suretyship by Correspondence and Promissory Notes.—See BANKRUPTCY AND INSOLVENCY, 2.

PRIVILEGE.

In Libel, Destroyed by Excess of Language.—See LIBEL.

PROHIBITION.

Against Enforcement of Receiver Order.]—See RECEIVER, 1.

PROMISSORY NOTES.

See BILLS OF EXCHANGE.

PUBLICATION.

Of Stenographic Notes.]—See INJUNCTION, 1.

Of Libel.]—See LIBEL.

PUBLIC SCHOOLS.

Union School Section—Alteration of Boundaries—Five Years' Limit—R. S. O. ch. 292, secs. 38, 43, 44.]—In 1897 a township council passed a by-law altering the boundaries of an existing school section, and this was affirmed by the county council on appeal. In 1898 the county council, on appeal from the refusal of the township council to do so, appointed arbitrators to consider the advisability of forming a union school section from parts of the section in question and of another section, and an award was made setting apart the new union school section, and thereby making material alterations in the boundaries of the existing section:—

Held, that although the by-law of 1898 was passed under secs. 43 and 44 of the Public Schools Act, R. S. O. ch. 292, it came within the prohibition of sec. 38, sub-sec. 3, which required that the by-law of 1897 should remain in force for five years; and therefore the by-law of 1898 was quashed and the award set aside.

Re Trustees of School Section Eleven, Amaranth, et al. and County of Dufferin, 43.

QUEEN VICTORIA NIAGARA FALLS PARK.

Powers of Commissioners to Declare Agreement Forfeited.]—See CONTRACT, 2.

RAILWAYS.

Engineer of, as Arbitrator.]—See ARBITRATION AND AWARD, 1.

Expropriation of Lands—"Owner"—Person in Possession—Title—Jus Tertii—51 Vict. ch. 29, sec. 103, D.J.]—By sec. 103 of the Railway Act of Canada, 51 Vict. ch. 29, the lands which may be taken without the consent of the owner shall not be more than 650 yards in length by 100 yards in breadth.

The defendants desired to use for their railway a tract of land more than 650 yards long of which the plaintiff was in possession, and they alleged that a strip in the middle of the tract was ordnance land of the Crown, and therefore sought to expropriate two pieces, one on each side of the alleged ordnance reserve, which latter the plaintiff claimed as his own by length of possession:—

Held, that the scheme of the Act is that the company shall deal with the person in possession as owner, and if the company propose to disturb that possession, it must be pursuant to the powers conferred by the Act; the matter of title is to be held in abeyance until a later stage in the expropriation proceedings. The company cannot, even in the case of defective title, ignore the

person who actually occupies the land as owner, and proceed as if his interest had been duly invalidated by legal process on the part of the real owner. Though part of the land be held by a precarious tenure, yet where there is possession of the whole as one property, there should be but one set of proceedings and one arbitration, and the whole should be dealt with under the statute as the property of one and the same owner. *Stewart v. Ottawa and New York R. W. Co.*, 599.

RECEIVER.

Equitable Execution—Interest under Will—Interference with Discretion of Executors—Prohibition—Division Court.—The mother of the judgment debtor by her will empowered her executors, if in their discretion they should see fit, to pay the income of her estate, in part or in whole, to and for his benefit and advantage, at such time and in such manner and sums as they should see fit, leaving it to their option and discretion whether they should pay him any sum.

An order was made in a Division Court action, after judgment, appointing the judgment creditor receiver to receive the amount of his judgment from the executors, whenever they should exercise their discretion to pay the judgment debtor the amount of the judgment, or any part thereof.

Prohibition was granted against the enforcement of this order:—

Held, following *The Queen v. Judge of County Court of Lincolnshire* (1887), 20 Q. B. D. 167, that if the order was intended to interfere with the action of the executors,

it should not have been made; and if it did not so interfere, it was nugatory. *Re McInnes v. McGaw*, 38.

See EQUITABLE EXECUTION.

RENT.

Acceleration of, Where Assignment for Benefit of Creditors Made.—See LANDLORD AND TENANT, 1.

Quantum of, After Holding Over on Expiry of Lease.—See LANDLORD AND TENANT, 2.

RES JUDICATA.

Of Judgment not Appealed From.—See HABEAS CORPUS.

RIPARIAN OWNERS.

Right by, to Use of Water.—See WATERS AND WATERCOURSES.

RULES.

Con. Rule 780.—See TRIAL.

Con. Rule 825.—See APPEAL.

Con. Rule 938.—See WILL, 6.

SALE OF GOODS.

No Necessity on a Bond Fide Sale to Complete the Bill of Sale by Execution in Any Particular Time After Sale.—See BILL OF SALE.

SET OFF.

By Counterclaim, Amount of.—
See COUNTY COURTS.

SETTLEMENT.

"Children" — Vested Remainder.]
—By a marriage settlement certain land was conveyed to trustees in trust to sell and convey, as the husband and wife might appoint, and to invest the money and pay the interest to the wife during life, and in case the husband survived the wife, and there was a child or children then surviving, to pay the interest to the husband during life, and after the decease of both to divide the money equally among the children, and if there was only one child to pay the whole to such child, and in case of the death of the wife without issue to pay the money to the husband, and in case the husband and wife did not make any appointment, then in trust to support the contingent remainders thereafter limited, and to pay the rents on the same trusts as the money. Two children were born; the husband died; one of the children attained twenty-one, married, and died before his mother, leaving his sister and a daughter surviving. On the death of the mother:—

Held, that the deceased son took a vested interest, although he died before the period for conveying, and that his daughter was entitled to her father's share. *Lazier v. Robertson et al.*, 517.

SHAREHOLDERS.

List of, Transmitted to Provincial Secretary.—See COMPANY, 5.

SHARES.

Transfer of in Blank.—See COMPANY, 2.

SOLICITOR.

Acting as Executor, Liability of Co-executor for Investment Loss.—
See TRUSTS AND TRUSTEES.

Fraud of.—See EXECUTORS AND ADMINISTRATORS, 2.

STATUTES.

14 Geo. III. ch. 48, secs. 1, 2.]—See LIFE INSURANCE, 6.

C. S. U. C. ch. 53, secs. 2, 5, 38.]—See COMPANY, 4.

R. S. C. ch. 41.]—See COMPANY, 3.

R. S. C. ch. 124, sec. 39.]—See LIFE INSURANCE, 7.

R. S. C. ch. 129, sec. 41.]—See COMPANY, 3.

R. S. C. ch. 142.]—See EXTRADITION.

R. S. O. (1887) ch. 110, sec. 36.]—See EXECUTORS AND ADMINISTRATORS, 1.

R. S. O. (1887) ch. 136.]—See LIFE INSURANCE, 4.

R. S. O. (1887) ch. 184, sec. 436.]—See MUNICIPAL CORPORATIONS, 5.

R. S. O. (1887) ch. 184, sec. 495.]—See MUNICIPAL CORPORATIONS, 1.

R. S. O. (1887) ch. 184, sec. 503, subsec. 2.]—See MUNICIPAL CORPORATIONS, 1.

R. S. O. (1887) ch. 193, sec. 135.]—See ASSESSMENT AND TAXES, 1.

R. S. O. (1887) ch. 248, Sch. A.]—See ASSESSMENT AND TAXES, 2.

51 Vict. ch. 19, sec. 6 (O.).]—See DAMAGES.

- 51 Vict. ch. 29 (Railway Act), sec. 103 (D.).]—*See* RAILWAYS.
- 52 Vict. ch. 26, sec. 2 (O.).]—*See* COMPANY, 1.
- 52 Vict. ch. 32, sec. 20 (D.).]—*See* COMPANY, 3.
- 53 Vict. ch. 33, sec. 26 (D.).]—*See* BILLS OF EXCHANGE.
- 55 Vict. ch. 39, secs. 33, 34.]—*See* LIFE INSURANCE, 7.
- 55 Vict. ch. 39, sec. 42 (O.).]—*See* LIFE INSURANCE, 2.
- 55 Vict. ch. 42, sec. 612, sub-sec. 1 (O.).]—*See* MUNICIPAL CORPORATIONS, 2.
- 55 & 56 Vict. ch. 29, sec. 684 (D.) (Code).]—*See* EXTRADITION.
- 55 & 56 Vict. ch. 29, secs. 562, 553, 558.]—*See* MUNICIPAL CORPORATIONS, 3.
- 55 & 56 Vict. ch. 29, secs. 743, 744.]—*See* CRIMINAL LAW.
- 56 Vict. ch. 31 (D.) (Canada Evidence Act), 1893, sec. 4, sub-sec. 2.]—*See* CRIMINAL LAW.
- 56 Vict. ch. 35, sec. 19 (O.).]—*See* MUNICIPAL CORPORATIONS, 1.
- 57 Vict. ch. 50, sec. 8 (O.).]—*See* MUNICIPAL CORPORATIONS, 1.
- 57 Vict. ch. 55, secs. 7, 8, 24 (O.).]—*See* DITCHES AND WATERCOURSES.
- 60 Vict. ch. 28, sec. 22 (O.).]—*See* COMPANY, 1.
- 60 Vict. ch. 36 (O.).]—*See* LIFE INSURANCE, 4.
- R. S. O. ch. 9, sec. 109.]—*See* PENAL ACTIONS AND PENALTIES.
- R. S. O. ch. 51, sec. 57 (Judicature Act), sub-sec. 4.]—*See* INJUNCTION, 2.
- R. S. O. ch. 55, sec. 23, sub-sec. 11.]—*See* INJUNCTION, 2.
- R. S. O. ch. 55, secs. 28, 29.]—*See* COUNTY COURTS.
- R. S. O. ch. 55, sec. 52 (1).]—*See* APPEAL.
- R. S. O. ch. 60, sec. 200.]—*See* DIVISION COURTS, 2.
- R. S. O. ch. 60, sec. 205.]—*See* DIVISION COURTS, 1.
- R. S. O. ch. 62, sec. 6.]—*See* ARBITRATION AND AWARD, 1.
- R. S. O. ch. 88.]—*See* INTOXICATING LIQUORS.
- R. S. O. ch. 97, sec. 12 (2).]—*See* CORONER.
- R. S. O. ch. 127, sec. 5.]—*See* HUSBAND AND WIFE.
- R. S. O. ch. 129, sec. 32, sub-sec. (b).]—*See* EXECUTORS AND ADMINISTRATORS, 1.
- R. S. O. ch. 129, sec. 38.]—*See* EXECUTORS AND ADMINISTRATORS, 1.
- R. S. O. ch. 133, sec. 5, sub-sec. 11.]—*See* LIMITATION OF ACTIONS.
- R. S. O. ch. 147.]—*See* DIVISION COURTS, 2.
- R. S. O. ch. 147 (Assignments and Preferences Act).]—*See* BANKRUPTCY AND INSOLVENCY, 2.
- R. S. O. ch. 148.]—*See* BILL OF SALE.
- R. S. O. ch. 149, sec. 3.]—*See* DAMAGES.
- R. S. O. ch. 170, sec. 34.]—*See* LANDLORD AND TENANT, 1.
- R. S. O. ch. 191, sec. 79.]—*See* COMPANY, 5.
- R. S. O. ch. 199, sec. 59.]—*See* ARBITRATION AND AWARD, 2.
- R. S. O. ch. 203, sec. 160.]—*See* LIFE INSURANCE, 5.
- R. S. O. ch. 203, sec. 150, sub-secs. 1, 5.]—*See* LIFE INSURANCE, 5, 6.
- R. S. O. ch. 223 (Municipal Act), sec. 80.]—*See* CONTRACT, 4.

R. S. O. ch. 223, sec. 128, sub-sec. 2, 3.]—*See* MUNICIPAL ELECTION.

R. S. O. ch. 223 (Municipal Act), sec. 275.]—*See* MUNICIPAL CORPORATIONS, 6.

R. S. O. ch. 223, sec. 384, sub-sec. 2.]—*See* MUNICIPAL CORPORATIONS, 4.

R. S. O. ch. 223, secs. 445, 446.]—*See* ARBITRATION AND AWARD, 2.

R. S. O. ch. 223, sec. 484.]—*See* MUNICIPAL CORPORATIONS, 5.

R. S. O. ch. 223, sec. 583, sub-secs. 30, 31.]—*See* MUNICIPAL CORPORATIONS, 7.

R. S. O. ch. 223, secs. 664-685.]—*See* MUNICIPAL CORPORATIONS, 2.

R. S. O. ch. 223, secs. 704, 705.]—*See* MUNICIPAL CORPORATIONS, 3.

R. S. O. ch. 224, sec. 7, sub-sec. 5.]—*See* ASSESSMENT AND TAXES, 2.

R. S. O. ch. 224 (Assessment Act), sec. 8, sub-sec. 2.]—*See* MANDAMUS.

R. S. O. ch. 224, sec. 26.]—*See* ASSESSMENT AND TAXES, 3.

R. S. O. ch. 224, sec. 147.]—*See* ASSESSMENT AND TAXES, 1.

R. S. O. ch. 245, secs. 2, 34, 51.]—*See* INTOXICATING LIQUORS, 2.

R. S. O. ch. 245, sec. 124.]—*See* INTOXICATING LIQUORS, 3.

R. S. O. ch. 246.]—*See* SUNDAY.

R. S. O. ch. 292, secs. 38, 43, 44.]—*See* PUBLIC SCHOOLS.

61 Vict. ch. 19, sec. 4 (O.).]—*See* COMPANY, 1.

STENOGRAPHIC NOTES.

Rights of Employer as to Notes Taken by Employed Stenographer.]—*See* INJUNCTION, 1.

Of Evidence.]—*See* EVIDENCE.

STOCK EXCHANGE.

Usage of.]—*See* COMPANY, 2.

STREET RAILWAYS.

Negligence—Operation of Car—Collision—Contributory Negligence—Proximate Cause—Nonsuit.]—Where the evidence of negligence and of contributory negligence are so interwoven that contributory negligence is brought out and established on the evidence of the plaintiff's witnesses, if there is no conflict on the facts in proof, the Judge may withdraw the question from the jury and direct a nonsuit.

Wakelin v. London and South-Western R. W. Co. (1886), 12 App. Cas. at p. 52, referred to.

In an action against a street railway company for negligence, it appeared that an electric car of the defendants was being run at a very rapid speed and that the gong was not sounded as the car approached a certain street, at the junction of which the plaintiff, who was driving a horse along the same street and in the same direction in which the car was going, turned in front of the car to cross the rails, when a wheel of his vehicle was struck by the car, and he was injured. It also appeared by the evidence of his own witnesses that he did not, before turning, look or listen to ascertain the position of the car, although he knew it was coming :—

Held, that this was negligence on his part, and was the proximate cause of the disaster, for the defendants could not, by the exercise of reasonable or any degree of diligence or care, after this negligence of the plaintiff, have avoided the misfortune.

Nonsuit affirmed. *Danger v. London Street Railway Company*, 493.

SUNDAY.

R. S. O. ch. 246—Ordinary Calling—Foreman of Railway Elevator—Employer.]—The defendant was convicted of following his ordinary calling of foreman of the Grand Trunk Railway Company elevator in superintending the unloading of grain from a vessel into the elevator on Sunday :—

Held, that R. S. O. ch. 246 does not apply to that railway, and as it did not apply to the employer it did not apply to the employee.

Conviction quashed, with costs against the prosecutor. *Regina v. Reid*, 732.

SURETY.

See PRINCIPAL AND SURETY.

TAX SALE.

Taxes Paid Under Mistake, after Land Sold for Taxes.]—See MISTAKE.

TELEPHONE.

Poles on Street—Supervision of Municipality—Interference with Public Travel—Liability.]—A telephone company having permission by its Act of incorporation to erect poles on the streets of towns and incorporated villages, so as not to interfere with the public right of travel, is not relieved from liability for damages when it plants the poles on the highway in such a way as to become an element of danger to the public, although, as required by the Act of incorporation, the poles are planted under the supervision of the municipality. *Bonn v. The Bell Telephone Company*, 696.

TRIAL.

Jury—Failure to Agree—Rule 780—Right of Judge to Dismiss Action.]—Rule 780 which provides that “if the jury disagree and find no verdict, the Judge at, or after the trial may, notwithstanding, dismiss the action” does not empower the Judge in every case of disagreement to determine the action himself; it is confined to the case where he is of the opinion that he should have withdrawn it from the jury. *Floor v. The Michigan Central Railway Company*, 635.

TRUSTS AND TRUSTEES.

Investment—Fraud of Co-trustee—Cheque—Forging Indorsement.]—L., a trustee under a will, relying upon the report of his co-trustee, a solicitor, in investing moneys of the estate, that he had made a loan on satisfactory security, joined him in signing a cheque on the estate bank account payable to the order of the alleged borrower. The solicitor trustee indorsed the cheque by forging the payee's name, obtained the money and absconded :—

Held, that L. was not chargeable with the loss. *Re McLatchie. Preston v. Leslie*, 179.

Discharge of Retired Trustee Mortgagor by Subsequent Change in Terms of Mortgage.]—See PRINCIPAL AND SURETY, 2.

See WILL, 3.

VENUE.

Change of in Criminal Case.]—See CRIMINAL LAW.

WATER AND WATERCOURSES.

Prescription—Riparian Rights—Artificial Channel.—About the end of the last century an artificial channel or water-race was built across a lot now owned by the plaintiffs for the purpose of carrying water from a stream above the plaintiffs' land to a mill below, the water being diverted into the channel by means of a dam. The channel and the banks on either side of it never formed part of the plaintiffs' land having been excepted therefrom so that their land was not contiguous to the water. The defendants diverted the water and the plaintiffs were thereby deprived of the use of the same for watering their cattle :—

Held, that the plaintiffs were not riparian proprietors and could not claim any right by prescription to the use of the water.

Decision of ROSE, J., reversed. *Buchanan v. Ingersoll Waterworks Company*, 456.

WILL.

1. *Devise—Restraint on Alienation—Repugnancy—Invalidity—Contingent Executory Interest—Remoteness—Perpetuities.*—In the early part of a will, lands were devised to the vendor, a son of the testator, in fee, and other lands were devised to other children, but in the latter part of the will there was this clause : "It is fully understood that my children have no power to make sale or mortgage any of the lands mentioned, but to go to their heirs and successors * *. Should any of my children die childless leaving husband or wife, said husband or wife to have a third during the term of their natural life :"—

Held, that the first part of this clause amounted to a total restriction upon alienation, and was repugnant to the nature of the estate given by the devise, and was therefore void.

Held, that the words "die childless" in the last part of the clause should be taken to mean "die not having children or a child living at the time of such death," and this part of the clause created a contingent executory interest or estate of freehold, which, from its legal nature, would, upon the contingency happening in its favour, spring up into existence.

Held, also, that although many children of the vendor were living, none of whom was born till many years after the testator's death, and all of whom must die before the executory interest could take effect, yet the gift was not too remote, and did not infringe upon the rule against perpetuities. *Re Thomas and Shannon*, 49.

2. *Restraint on Alienation—Invalidity.*—Devise of real estate to a son with a condition as follows : "But I direct that before my said son * * shall sell, mortgage, trade or dispose of, or encumber the said property or any part thereof, or any farm produce or timber, that he shall first obtain the consent of my sister * * " :—

Held, that the restriction being against all kinds of alienation, and in that regard absolute and unlimited, as the required consent was a condition precedent to any kind of alienation and unlimited as to time, the restraint was void.

Judgment of FALCONBRIDGE, J., reversed, MEREDITH, J., dissenting.

Per MEREDITH, J.—The restraint on alienation is limited in point of

time to the sister's lifetime and so valid, following *Earls v. McAlpine* (1881), 6 A. R. 145. *McRae v. McRae et al.*, 54.

3. *Repugnant Clauses—Construction.*]—A testator by the third clause of his will devised a lot of land to a son in fee simple, and by the fourth clause it was provided (as happened) that if his said son should leave no lawful heir or children the plaintiff, another son, should have the lot in fee simple.

By the fifth clause he gave his wife the use of half the lot during her life, and after her death such half of the lot was to belong to his son firstly above mentioned, in fee simple:—

Held, that the fourth and fifth clauses were irreconcilable; nor could they be transposed so as to reduce the fee simple in the third clause to an estate for life should the devisee therein die without issue, with remainder to the plaintiff: that the devise in the third clause was by the fourth clause cut down to an estate tail with a remainder in fee to the plaintiff, and that the fifth clause gave a life estate in the half of the lot to the testator's widow with a remainder in fee to the son firstly mentioned.

Judgment of ROBERTSON, J., varied. *McMillan v. McMillan et al.*, 627.

4. *Construction—Legacy—"Cousins"—Indefinite Disposition—Trust—Power of Appointment—General Power.*]—The testator died a bachelor, leaving no relations nearer than first cousins. By his will he gave certain specific legacies, one of which was, by clause 7, "to each of my cousins" the sum of \$1, and proceeded:—

"9. I desire that my executors

* * shall have full power to make such and any disposition of the residue * * of my * * estate as they, in their judgment, may deem best, and to make due inquiry into the financial and social standing of my relations in Ireland, and, after an investigation and a proper knowledge is obtained, to make such grants and disposition of a portion of my estate and property as they, in their judgment, consider best, to such relations.

"10. I also give my said executors power and desire them to dispose of any balance of my estate * * to the best of their judgment, where they may consider it will do the most good and deserving.

"12. I also give my executors power to hold property in trust for any of my friends whom they may think proper."

By clause 1 he appointed certain persons "executors and trustees" of his will:—

Held, that the word "cousins" in clause 7 must be taken to mean first cousins only.

2. That no trust was created in favour of the relations in Ireland; the power given by clauses 9 and 10 was a general power over the residue, without the creation of a trust; it was an absolute power of appointment, which the executors might exercise in favour of themselves or any other person or persons; and the heirs or next of kin could not successfully, as upon an intestacy, make any claim upon the residue, unless in case of default of appointment.

3. That the expressions used in clauses 1 and 12 did not shew that the residue was held by the executors in trust or that there was any trust connected with the power given. *Higginson et al. v. Kerr et al.*, 62.

5. *Survivorship — Youngest Surviving Child Attaining Majority — Period of Distribution — Vesting of Shares.*]—A testator by his will gave his residuary estate to his executors upon trust to make provision for the support and maintenance of his family and for their education until his youngest surviving child should attain twenty-one years of age, when it was to be divided by the executors, by their setting apart one-third thereof for his widow, during her widowhood or until she remarried, and the remaining two-thirds to his surviving children in the proportion of four parts to the sons and three parts to the daughters; and after the death or marriage of his widow, the said one-third was to be divided between his surviving children in the above proportions. The widow survived the testator, but died before the youngest surviving child attained the age of twenty-one years :—

Held, that the words of survivorship referred to the period of distribution, namely, when the youngest surviving child attained twenty-one years of age, and, therefore, only the children then living were entitled to share in the residue, and this applied as well to the shares to be taken by the children as to the share to be set apart for the widow. *Re Soules*, 140.

6. *Gift — Mistake in Name of Donee — Validity — Declaration — Originating Notice — Rule 938.*]—

A testator bequeathed a sum of money to his "sister Anastasia Cummings." He had only two sisters, Catharine Kelly, to whom he bequeathed a like sum, by her proper name, and Maria Cummins :—

Held, that the gift took effect in favour of Maria Cummins.

Held, also, that a declaration to that effect could properly be made

upon an originating notice under Rule 938.

In re Sherlock (1898), 18 P. R. 6, followed. *Re Whitty*, 300.

7. *Restraint on Alienation — Validity — Attempt to Alien — Forfeiture — Heirs-at-law.*]—A testator devised land to his three sons, in equal shares, in fee simple, adding, "without power to them, or any of them, to charge or alien the same or any part thereof except by * * will :—"

Held, following *Re Winstanley* (1884), 6 O. R. 315, a valid restraint on alienation.

The three sons were the sole heirs at law of the testator. After becoming entitled to the possession of the land under the devise, they joined in a mortgage of it in fee to a stranger. One of the three then contracted to sell his share to the other two :—

Held, that each of the devisees, by making the mortgage, had forfeited his estate under the will, and each had become entitled as heir at law to an undivided third of the whole, and therefore the vendor could make a good title in fee simple to his undivided share to his brothers, the purchasers. *Re Bell*, 318.

8. *Power of Appointment — Disposition by Will — Execution of Power — Invalidity of the Bequest.*]—

—A wife having a power of appointment under her husband's will in the words "my said wife shall have full power to dispose of by will or otherwise," by her will devised all her real and personal estate to executors "in trust to convert the same into cash" and pay legacies, and as to the rest and residue to convert into cash and "divide the proceeds among friends, relatives and labour-

ers in the Lord's work according to the judgment of my executors":—

Held, that the disposition made clearly indicated an intention to take the property dealt with out of the instrument containing the power for all purposes, and not only for the limited purpose of giving effect to the particular disposition expressed; but that the residuary bequest was void as too indefinite, and that the executors took the property in trust for the next of kin of the appointor and not beneficially. *Re Wilson, Reid et al. v. Jamieson*, 553.

Reapportionment of Insurance Money by.—See LIFE INSURANCE, 1, 3.

Policy of Insurance Issued After Date of, not Affected by Devise to "Preferred Beneficiaries" as Defined by the Ontario Insurance Act.—See LIFE INSURANCE, 5.

WINDING UP.

Effect of Order for.—See LIFE INSURANCE, 3—COMPANY, 3, 4.

WITNESS.

Death of after Examination and before Cross-examination.—See EVIDENCE.

WORDS.

"Conveniently."—See PENAL ACTIONS AND PENALTIES.

"Cousins."—See WILL, 4.

"Die Childless."—See WILL, 1.

"Land Mortgage Debenture."—See COMPANY, 4.

"Owner."—See RAILWAYS.

"Public Hospital."—See ASSESSMENT AND TAXES, 2.

"Regulating and Governing."—See MUNICIPAL CORPORATIONS, 1.

"Tenant."—See LANDLORD AND TENANT, 3.

"Transient Traders."—See MUNICIPAL CORPORATIONS, 7.

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